

EXHIBIT G

01/22/2007 11:09 FAX 925 933 4126

MILLER STARR

图 002

FILED

JAN 22 2007

SAN JUAN OBISPO SUPERIOR COURT
BY Nancy G. Gudino
N. Gudino, Deputy Clerk

1 GEORGE B. SPEIR (Bar No. 78276)
2 ARTHUR F. COON (Bar No. 124206)
3 CAROLYN E. NELSON (Bar No. 238526)
4 MILLER STARR REGALIA
5 A Professional Law Corporation
1331 N. California Blvd., Fifth Floor
Post Office Box 8177
Walnut Creek, California 94596
Telephone: 925 935 9400
Facsimile: 925 933 4126

6 Attorneys for Plaintiffs
7 BARRY A. COHEN, LEONARD A. COHEN,
8 OLDE PORT INN, INC., and OLDE PORT
FISHERIES, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN LUIS OBISPO

BY FAX

11 BARRY A. COHEN; LEONARD A.
12 COHEN; OLDE PORT INN, INC.; and
13 OLDE PORT FISHERIES, INC.

Case No. CV 040897

NOTICE OF MOTION AND MOTION OF
PLAINTIFFS FOR ATTORNEYS' FEES AND
LITIGATION EXPENSES AND COSTS

14. Plaintiffs,
15. v.
16. PORT SAN LUIS HARBOR DISTRICT;
and DOES 1 to 50, inclusive.

Date: February 21, 2007
Time: 9:00 a.m.
Judge: Hon. Barry T. LaBarbera
Location: 801 Grand Avenue
San Luis Obispo, CA

17 Defendants.
18 _____
19 AND RELATED CROSS-ACTION.

Complaint Filed: October 22, 2004
Trial Date: May 8, 2006

20 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

1 PLEASE TAKE NOTICE that on February 21, 2007, at 9:00 a.m., or as soon
2 thereafter as the matter may be heard, in Department 2 of the above-entitled Court, located at
3 1035 Palm Street, San Luis Obispo, California, Plaintiffs Barry Cohen, Leonard Cohen, Olde Port
4 Fisheries, Inc., and Olde Port Inn, Inc. (the "Cohens" or "Plaintiffs") will move, and hereby do,
5 move this Court pursuant to Civil Code section 1717, Code of Civil Procedure sections 1021 and
6 1032, California Rule of Court 3.1702, the applicable contracts, and all applicable law, for an

CRAA1441581683365.1

NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES

01/22/2007 11:09 FAX 925 933 4126

MILLER STARR

003

1 order awarding to Plaintiffs their attorneys' fees, litigation expenses, and costs against Defendant
2 Port San Luis Harbor District ("Defendant" or "District").

3 This motion is made on the grounds that Plaintiffs prevailed and recovered the
4 greater relief in this action to enforce, declare rights under, and obtain damages and/or equitable
5 relief under the 1993 Settlement Agreement and the 1994 Lease, which provide for recovery of
6 attorneys' fees to the party prevailing in such actions. In its Statement of Decision and Judgment,
7 this Court awarded B. Cohen \$50,000 in damages, and awarded all Plaintiffs substantial equitable
8 relief, requiring Defendant to comply with its contractual obligations to provide 17 to 20 public
9 parking spaces on the Harford Pier terminus, to provide commercial trucks at least one space to
10 stop (two if possible) that does not block the public parking spaces or fire lane, to repair all public
11 walkways from the Harford Landing to the end of the Pier terminus, and to implement and
12 enforce parking regulations and rights of the Cohens. Since before this lawsuit was filed,
13 Plaintiffs primary litigation objective was to compel District to recognize, stop breaching and
14 comply with these very contractual and legal obligations. Plaintiffs recovered the greater relief in
15 this action, and are therefore entitled to recover their fees. Because the 1993 Settlement
16 Agreement, which is incorporated into and integrated with the 1994 Lease, and which also
17 incorporates the 1976 Lease, provides that the prevailing party shall be entitled to litigation
18 "expenses" and "costs", in addition to attorney fees, Plaintiffs are also entitled to recover their
19 litigation expenses not claimed in the Memorandum of Costs filed pursuant to Code of Civil
20 Procedure section 1032 on December 7, 2006.

21 This motion is based on this Notice of Motion and Motion for Attorneys' Fees, the
22 accompanying Memorandum of Points and Authorities, Declarations of Arthur F. Coon, Barry A.
23 Cohen, Leonard A. Cohen, and Richard Carsel, and Request for Judicial Notice, all pleadings and
24
25
26
27
28

CRAA441584683365.1

-2-

NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES

01/22/2007 11:00 FAX 925 033 4126

MILLER STARR

004

1 records on file herein, and on such further oral and documentary evidence and argument as may
2 be presented at or before the hearing of the motion.

3 Dated: January 22, 2007

MILLER STARR REGALIA

4 By: 

5 ARTHUR F. COON
6 Attorneys for Plaintiffs BARRY A.
7 COHEN, LEONARD A. COHEN, OLDE
8 PORT INN, INC., and OLDE PORT
9 FISHERIES, INC.

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CRAAM415R\683365.1

-3-

NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES

01/22/2007 11:08 FAX 925 933 4126

MILLER STARR

2005

PROOF OF SERVICE

(*Barry A. Cohen, et al. v. Port San Luis Harbor District*
 San Luis Obispo Superior Court, Case No. CV 040897)

I, Karen Irias, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 1331 N. California Blvd., Fifth Floor, Post Office Box 8177, Walnut Creek, CA 94596. On January 22, 2007, I served the within documents:

NOTICE OF MOTION AND MOTION OF PLAINTIFFS FOR ATTORNEYS' FEES AND LITIGATION EXPENSES AND COSTS

- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- by transmitting via electronic e-mail, to the following e-mail addresses indicated below on this date before 5:00 p.m.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Walnut Creek, California addressed as set forth below.
- by placing the document(s) listed above in a sealed _____ envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a _____ agent for delivery.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

Martin P. Moroski
 Adamski, Moroski, Madden & Green
 P. O. Box 3835
 San Luis Obispo, CA 93403-3835
 Tel: (805) 543-0990
 Fax: (805) 543-0980
 e-mail:
moroski@adamskimoroski.com

Overnight/Hand Delivery Only:
 6633 Bay Laurel Place
 Avila Beach, CA 93424

Attorneys for Defendant and Cross-
 Complainant PORT SAN LUIS
 HARBOR DISTRICT

David M. Cumberland
 Cumberland, Coates & Duenow, LLP
 550 Dana Street
 San Luis Obispo, CA 93401-3429
 Tel: (805) 541-4200
 Fax: (805) 541-4293
 e-mail: dmc@ccdlawfirm.com

Co-Counsel for Defendant and Cross-
 Complainant PORT SAN LUIS
 HARBOR DISTRICT

01/22/2007 11:08 FAX 925 933 4126

MILLER STARR

006

1 *Courtesy Copy:*

2 Hon. Barry T. LaBarbera
3 San Luis Obispo Superior Court
4 Department 2
5 1035 Palm St., 3rd Fl.
6 San Luis Obispo, CA 93408
7 e-mail:
8 Barry.LaBarbera@slo.courts.ca.gov

9 I am readily familiar with the firm's practice of collection and processing
10 correspondence for mailing. Under that practice it would be deposited with the U.S. Postal
11 Service on that same day with postage thereon fully prepaid in the ordinary course of business. I
12 am aware that on motion of the party served, service is presumed invalid if postal cancellation
13 date or postage meter date is more than one day after date of deposit for mailing in affidavit.

14 I declare under penalty of perjury under the laws of the State of California that the
15 foregoing is true and correct.

16 Executed on January 22, 2007, at Walnut Creek, California.



17 Karen Irisas

18

19

20

21

22

23

24

25

26

27

28

CRAA\44158\683365.1

-5-

01/22/2007 11:17 FAX 925 933 4128

MILLER STARR

002

1 GEORGE B. SPEIR (Bar No. 73276)
 2 ARTHUR F. COON (Bar No. 124206)
 3 CAROLYN E. NELSON (Bar No. 238526)
 4 MILLER, STARR & REGALIA
 5 A Professional Law Corporation
 6 1331 N. California Blvd., Fifth Floor
 7 Post Office Box 8177
 8 Walnut Creek, California 94596
 9 Telephone: (925) 935-9400

10 Attorneys for Plaintiffs and Cross-Defendants
 11 BARRY A. COHEN, LEONARD A. COHEN,
 12 OLDE PORT INN, INC., and OLDE PORT
 13 FISHERIES, INC.

FILED

JAN 22 2007

SAN LUIS OBISPO SUPERIOR COURT
 BY *Nancy G. Gudino*
 N Gudino, Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN LUIS OBISPO

BY FAX

14 BARRY A. COHEN; LEONARD A.
 15 COHEN; OLDE PORT INN, INC.; and
 16 OLDE PORT FISHERIES, INC.

Plaintiffs.

v.

PORT SAN LUIS HARBOR DISTRICT;
and DOES 1 to 50, inclusive.

Defendants.

AND RELATED CROSS-ACTION.

Case No. CV 040897

17 MEMORANDUM OF POINTS AND
 18 AUTHORITIES IN SUPPORT OF
 19 PLAINTIFFS' MOTION FOR ATTORNEYS'
 20 FEES AND LITIGATIONS EXPENSES AND
 21 COSTS

22 [Civ. Code, § 1717; Code Civ. Proc., §§ 1021,
 23 1032; Cal. Rules of Court, Rule 3.1702]

24 Date: February 21, 2007
 25 Time: 9:00 a.m.
 26 Judge: Hon. Barry T. LaBarbera
 27 Location: 801 Grand Avenue
 28 San Luis Obispo, CA

29 Complaint Filed: October 22, 2004
 30 Trial Date: May 8, 2006

CRAA144138683280.3

MPA LSO MOTION FOR ATTORNEYS' FEES

01/22/2007 11:17 FAX 925 933 4126

MILLER STARR

003

TABLE OF CONTENTS

2		Page	
3	I.	INTRODUCTION AND SUMMARY OF ARGUMENT	1
4	II.	STATEMENT OF FACTS	2
5		A. Defendant Breaches, and Cohens File Suit to Enforce, the Settlement	2
6		B. The Court's Statement of Decision and Judgment.....	3
7		C. The Contractual Attorneys' Fees Provisions	5
8	III.	LEGAL ARGUMENT	5
9		A. Governing Standards.....	5
10		B. Plaintiffs Are Entitled to an Award of Their Attorneys' Fees, Litigation Expenses, and Costs Under the Contracts on Which They Prevailed.....	6
11		1. Plaintiffs Are Prevailing Parties Entitled to Recover Their Attorneys' Fees Under Section 1717 and the Clear Language of the Contracts	6
12		2. Plaintiffs Are Entitled by Contract to Recover Their Litigation Expenses and Costs in Addition to Fees	12
13		C. Plaintiffs Are Entitled to the Full Amount of Fees and Litigation Expenses Sought	13
14		1. Plaintiffs' Requested Attorneys' Fees Are Reasonable	13
15		2. Plaintiffs' Litigation Expenses Are Reasonable	15
16	IV.	CONCLUSION	15

1 TABLE OF AUTHORITIES
2

	<u>Page</u>
3	
4 <u>CASES</u>	
5 <i>Acree v. General Motors Acceptance Corp.</i> (2001) 92 Cal.App.4th 385	7, 9, 11
6 <i>Ajaxo, Inc. v. E*Trade Group, Inc.</i> (2005) 135 Cal.App.4th 21	6
7 <i>Baugh v. Gart</i> (2006) 137 Cal.App.4th 737	7
8 <i>Bussey v. Affleck</i> (1990) 225 Cal.App.3d 1162	12, 13
9 <i>City of Oakland v. Oakland Raiders</i> (1988) 203 Cal.App.3d 78	14
10 <i>Epstein v. Frank</i> (1981) 125 Cal.App.3d 111	7
11 <i>Graciano v. Robinson Ford Sales, Inc.</i> (2006) 144 Cal.App.4th 140	13
12 <i>Guam Soc'y of Obstetricians & Gynecologists v. Ada</i> (9th Cir. 1996) 100 F.3d 691	14
13 <i>Hastings v. Matlock</i> (1985) 171 Cal.App.3d 826	7
14 <i>Horsford v. Board of Trustees of Cal. State Univ.</i> (2005) 132 Cal.App.4th 359	14
15 <i>Hsu v. Abbara</i> (1995) 9 Cal.4th 863	6, 8
16 <i>Jackson v. Homeowners Assn. Monte Vista Estates - East</i> (2001) 93 Cal.App.4th 773	8
17 <i>PLCM Group, Inc. v. Drexler</i> (2000) 22 Cal.4th 1084	13, 14
18 <i>Sears v. Baccaglio</i> (1998) 60 Cal.App.4th 1136	5, 6, 7
19 <i>Texas Commerce Bank v. Garamendi</i> (1994) 28 Cal.App.4th 1234	6, 7
20	
21	
22	
23	
24	
25	
26	
27	
28	

01/22/2007 11:17 FAX 925 933 4126

MILLER STARR

005

1 STATUTES

2 Civil Code

3	Section 1641.....	7
4	Section 1717.....	passim
4	Section 1717(a).....	5, 6
5	Section 1717(b)(1).....	6, 7

5 Code of Civil Procedure

6	Section 1021.....	1, 5
7	Section 1032.....	5, 6
8	Section 1033.5(a)(10)(A).....	6

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

CRAAA415848389.S

-II-

MPA 15/0 MOTION FOR ATTORNEYS' FEES

1 1. INTRODUCTION AND SUMMARY OF ARGUMENT

2 Forced to fight a bullying governmental Goliath which stonewalled, contested liability,
3 and fought an economic war of attrition every step of the way, Plaintiffs Barry Cohen, Leonard
4 Cohen, OPF, and OPI ("Cohens" or "Plaintiffs") ultimately prevailed by obtaining a favorable
5 judgment equitably enforcing the parties' settlement agreement. The jury and Court found and
6 declared that Defendant Port San Luis Harbor District ("Defendant" or "District") breached every
7 contract; that all plaintiffs were beneficiaries of the breached contracts; that District must pay
8 Barry Cohen \$50,000 in past damages; and that District must specifically perform the material
9 parking/truck access and repair and maintenance settlement provisions, breach of which gave rise
10 to this lawsuit over two years ago.

11 For its part, District claims "victory" because Plaintiffs "only" won \$50,000 in monetary
12 relief, the declaratory and specific performance awards it fought so hard against--and still
13 defiantly refuses to comply with--are supposedly "de minimis"; and the Court cut B. Cohen's past
14 and future rent under the 1994 Lease in half until District performs its material contract
15 obligations as ordered. All District's contentions are absurd; the last is akin to claiming a court
16 order cutting a borrower's mortgage payments in half is a "victory" for the lender--a "defeat" any
17 rational borrower would welcome. In short, unmeritoriously belittling the greater relief won by
18 Plaintiffs does not give Defendant the greater relief. District's claims on the prevailing party issue
19 are thinner than the Emperor's new clothes. Cohens clearly won the greater relief on the
20 contracts, and achieved their primary litigation objective of establishing District's breaches and
21 enforcing the settlement agreement, thus entitling them to an award of fees, costs and expenses
22 under Code of Civil Procedure section 1021 and Civil Code section 1717 ("Section 1717").

23 A primary purpose of attorneys' fees clauses like those in the 1993 Settlement Agreement
24 and 1994 Lease is to protect plaintiffs with meritorious contract claims from defendants with
25 superior economic resources who could otherwise litigate to "win" an economic war of attrition
26 and render any victory by the prevailing parties a Pyrric one. Fee clauses should be equitably
27 enforced to prevent plaintiffs with meritorious contract claims from having to choose between
28 enforcing their rights and preserving their financial solvency.

1 In sum, and for reasons stated in more detail below, the plain language of the contract
 2 clauses, the applicable law, and simple justice require this court to enforce the fee clauses and to
 3 protect the Cohens from Defendant's overreaching use of its raw economic power to attempt to
 4 bully them into submission to its breaches. In equity, this Court must recognize Plaintiffs as
 5 prevailing parties and grant their motion for fees, costs and expenses.

6 II. STATEMENT OF FACTS

7 A. Defendant Breaches, and Cohens File Suit to Enforce the Settlement.

8 The facts of this case are by now well known to the Court.¹ This lawsuit arose when
 9 District breached a settlement agreement embodied in the 1993 Settlement Agreement, a
 10 Mutual Release ("1993 Settlement Agreement") and the 1994 Cold/Dry Storage Facility Lease
 11 ("1994 Lease"), which required District to make at least 17 public parking spaces available on the
 12 Pier terminus, provide regular semi-truck access to the Pier businesses without impeding the
 13 parking, repair and maintain the Pier (including decking), and grant Cohens and their customers
 14 non-exclusive use of public parking areas.

15 On June 25, 2004, District breached the settlement by adopting its "interim shared-use
 16 plan" (with no termination date) over Cohens' objections. (Complaint, Ex. E; Declaration of
 17 Barry A. Cohen ("B. Cohen decl."), ¶ 12-13.) The plan violated the settlement agreement by
 18 converting 9 of the promised 17 public parking spaces to a truck loading area. Cohens hired
 19 counsel,² and on July 2, 2004, sent District a public entity claim letter setting forth their demand,
 20 the facts regarding District's breaches, and a proposed resolution. (Declaration of Arthur F. Coon

21 ¹ To avoid unnecessary repetition and save paper, Plaintiffs incorporate by reference the Statement
 22 of Facts in their Memorandum of Points and Authorities in support of Motion to Strike
 23 District's Entire Memorandum of Costs, filed on December 26, 2006.

24 ² Cohens hired Miller Starr Regalia ("MSR") when it became evident District would breach the
 25 settlement. (B. Cohen decl., ¶ 11; Declaration of Leonard A. Cohen ("L. Cohen decl."), ¶ 3.)
 26 Cohens chose MSR because it had successfully handled a prior law suit (which resulted in the
 27 settlement agreement), and the firm therefore had a specialized knowledge of the parties and the
 28 agreements at issue. (Declaration of Richard A. Carsel ("Carsel decl."), ¶¶ 10-11; B. Cohen decl.,
 ¶ 11.) A local San Luis Obispo attorney, Richard Carsel, had referred Cohens to MSR for the
 preceding litigation because there were no local firms with practices comparable to MSR's
 specialized CEQA and real estate practice. (Carsel decl., ¶¶ 6-7.) MSR negotiated the settlement
 on behalf of Cohens and became well-acquainted with the parties and agreements. Because of the
 firm's special knowledge and connection to the case, Mr. Carsel again recommended and Cohens
 again hired MSR when District later breached that agreement. (B. Cohen decl., ¶ 11; L. Cohen
 decl., ¶ 3; Carsel decl., ¶ 10.)

1 ("Coon decl."), Ex. A.) The letter stated: "*Olde Port's primary concern and demand is that the*
 2 *District do whatever needs to be done to comply with its legal obligations without adversely*
 3 *affecting the contractual and legal rights of Olde Port and causing it further damages.*" (*Id.*, p. 3,
 4 *emph. added.*)³

5 District refused to honor its material settlement obligations, ultimately forcing B. Cohen's
 6 fish processing business out of business. (B. Cohen decl., ¶¶ 2, 12-16.) Left with no choice,
 7 Cohens were forced to file this lawsuit, seeking to compel District to comply with its obligations.
 8 Plaintiffs jointly alleged nine causes of action with a common purpose: to establish Defendant's
 9 breaches and remedy its stubborn refusal to honor its agreements to provide the required public
 10 parking and truck access, and to adequately repair and maintain the Pier.⁴

11 B. The Court's Statement of Decision and Judgment.

12 Defendant mounted an aggressive defense (Coon decl., ¶¶ 6, 11), and denied liability
 13 throughout the litigation. Defendant continued to breach, never offered to perform, and never
 14 made any realistically reasonable settlement offer. After several continuances (obtained by
 15 Defendant, over Plaintiffs' objections), trial commenced in May, 2006. The jury heard Plaintiffs'
 16 money damage claims for breach of the contracts and intentional interference with business
 17 advantage, and this Court heard their equitable claims, as well as Defendant's remaining Cross-
 18 Complaint causes of action for breach of contract, ejectment, and declaratory relief.⁵

19 The jury found Defendant breached every contract. It found OPI, OPF, and L. Cohen were
 20 third party beneficiaries of the contracts, including the 1994 Lease and 1993 Settlement
 21 Agreement. (12/11/06 Judgment ["Judg."], 3:16-8:12.) It awarded B. Cohen \$50,000 in past
 22 damages for Defendant's breaches of the 1994 Lease. (*Id.*, 8:25-27, 12:19-21).⁶

23 ³ Cohens suggested—though they had no obligation to—how District might reconfigure the Pier
 24 terminal to meet its legal obligations and even offered to advance up to \$20,000 to help District
 25 pay for the necessary work. (*Id.* at 4-5.) District rejected the advice and the offer.

26 ⁴ Plaintiffs prudently alleged several causes of action. Virtually all of the causes of action
 27 addressed one wrong: District's breach of contract. While District's conduct violated other laws
 28 (including the Coastal Act), and Plaintiffs had to prudently allege and seek all possible forms of
 relief (i.e., damages and specific performance), the focus of the complaint was clearly redressing
 District's *breach of contract*.

29 ⁵ Defendant's Cross-Complaint causes of action for express contractual and equitable indemnity
 30 were summarily adjudicated against it and in Cohens' favor before trial. (Judg., 2:23-28.)

31 ⁶ The jury did not award other Plaintiffs money damages, not because such damages did or
 32 would not occur, but because future damages were too difficult to ascertain. (SOD, 7:6-9.)

01/22/2007 11:18 FAX 925 933 4126

MILLER STARR

009

1 After the Court heard argument on the remaining equitable claims, it issued a 11/7/06
 2 Statement of Decision ("SOD"), and entered a Judgment incorporating the SOD,⁷ awarding
 3 substantial equitable relief to Cohens on their breach of contract claims. The Court entered a
 4 declaratory judgment agreeing with Cohens and finding District breached the settlement by
 5 failing to provide required semi-truck access, failing to maintain the public walkways, failing to
 6 provide 17 to 20 public parking spaces, and failing to enforce parking restrictions and limits.
 7 (SOD, 3:20-4:5, 6:8-13, 6:21-24; Judg., 12:28-13:8.) It ordered specific performance in favor of
 8 all Cohens on the 1994 Lease (and integrated 1993 Settlement Agreement), requiring District to
 9 provide commercial trucks *at least* one space for stopping that does not block the public parking
 10 spaces or fire lane.⁸ to repair all public walkways from Harford Landing to the end of the Pier
 11 terminus, and to reconfigure the defined parking spaces (per either Option D or F of Trial Exhibit
 12 32) so the public and customers of Plaintiffs' and other Pier businesses will have access to at least
 13 17 parking spaces on the Pier terminus. (SOD, 10:12-21; Judg., 13:12-18, 21-26.) The Court
 14 required District to ensure parking spaces adjacent to the Pier landing are not designated as
 15 exclusive parking for RVs or boat trailers. (SOD, 10:21-24; Judg., 13:26-14:1.) It ordered District
 16 to begin the work within 30 days from the Judgment. (SOD, 10:24-25; Judg., 14:1-2.) The Court
 17 further ordered that only one-half the rent set by the 1994 Lease terms would be due in the future
 18 until Defendant fully performed its obligations. (SOD, 5:25-27, 6:1-7; Judg., 13:18-21.)

19 On Defendant's Cross-Complaint, the Court entered judgment for B. Cohen on the
 20 express contractual indemnity claim, and for B. Cohen and OPF on the equitable indemnity claim.
 21 (Judg., 14:15-21.) On Defendant's claim for breach of the 1994 Lease, the Court did not award
 22 the relief sought by Defendant; it found that B. Cohen was substantially justified in not paying
 23 rent (due to District's breaches), and ordered that B. Cohen pay only partial back rent with no late
 24 fees. (SOD, 5:25-27; Judg., 13:18-21, 14:22-25.)⁹ Judgment was entered for B. Cohen on
 25 Defendant's ejectment claim, and partly for each side – as just set forth – on the wholly derivative

26 ⁷ This Court issued the Judgment on November 22, 2006 and an Amended Judgment nunc pro
 27 tunc to correct clerical errors on December 11, 2006.

28 ⁸ Defendant must make *at least* one space available for temporary truck stoppage. If either
 29 Option D or F would allow a second space, Defendant *must* provide one. (SOD, 10:15-17.)

⁹ This partial back rent, plus prejudgment interest thereon, amounted to \$44,808.98, making
 B. Cohen the party with the net monetary recovery. (Judg., 14:22-25.)

CRAA4158683389.5

-4-

01/22/2007 11:18 FAX 925 933 4126

MILLER STARR

010

1 declaratory relief claim. (SOD, 5:8-10, 5:27-6:1; Judg., 14:26 – 15:6.)

2 C. The Contractual Attorneys' Fees Provisions.

3 The contracts District breached provide that the prevailing party in an action to enforce
 4 them shall be entitled to attorneys' fees. (Complaint, Exs. B, C, [1994 Lease and 1993 Settlement
 5 Agreement], B. Cohen decl., ¶ 8-9.) The 1993 Settlement Agreement states:

6 If any litigation be commenced between the parties hereto concerning this
 7 Agreement or the rights and duties of either Cohen or the District hereunder,
 8 *whether it be an action for damages, equitable or declaratory relief*, the
 9 prevailing party in such litigation, in addition to such other relief as may be
 granted by the Court, *shall be entitled to recover from the other party reasonable
 expenses, attorneys' fees and costs.*

10 (1993 S.A., ¶ 11, emph. added; B. Cohen decl., ¶ 8.) The 1994 Lease provides: "If either party
 11 brings an action to enforce the terms hereof or declare rights hereunder, the prevailing party in
 12 any such action, on trial or appeal, shall be entitled to its reasonable attorneys' fees to be paid by
 13 the losing party as fixed by the court." (1994 Lease, ¶ 18.M.)¹⁰

14 III. LEGAL ARGUMENT

15 A. Governing Standards.

16 A prevailing party in litigation is entitled to recover attorneys' fees where the parties have
 17 an agreement that provides for such recovery. (Code Civ. Proc., § 1021.) Where a contract
 18 specifically provides that attorneys' fees and costs shall be awarded to the prevailing party in an
 19 action to enforce that contract, the prevailing party on the contract *shall* be entitled to reasonable
 20 attorneys' fees. (Civ. Code, § 1717(a).) Section 1717 is properly applied where a prevailing party
 21 claims attorneys' fees based on a contract provision. (*Sears v. Baccaglio* (1998) 60 Cal.App.4th
 22 1136, 1158.) The party prevailing for the award of CCP § 1032 ("Section 1032") costs is not
 23 necessarily the prevailing party for the award of attorney's fees in contract actions under Section

24 ¹⁰ While the 1976 Lease does not contain an express attorneys' fees provision, a breach of that
 25 Lease – such as District alleged in its claim express contractual indemnity – would constitute a
 26 breach of the express good faith covenant in the 1993 Settlement Agreement, which as worded
 27 contains a broad prevailing party attorneys' fees clause. The 1993 Settlement Agreement contains
 28 a "Good Faith" clause, which expressly makes a violation of the 1976 Lease a violation of the
 1993 Settlement Agreement. (1993 S.A., ¶ 15 & Recitals; B. Cohen decl., ¶ 9.) Because the 1993
 Settlement Agreement provides that a prevailing party in an action to enforce the agreement is
 entitled to attorneys' fees, a prevailing party in an action to enforce the 1976 Lease is similarly
 entitled to attorneys' fees.

01/22/2007 11:18 FAX 925 933 4126

MILLER STARK

011

1 1717. (*Id.* at 1142.) Section 1717 defines "prevailing party" as "the party who recovered *a greater*
 2 *relief in the action* on the contract." (Civ. Code, § 1717(b)(1), emph. added.)

3 [T]he history of section 1717 . . . consistently adheres to the theme of equity in
 4 the award of fees....

5 "The legislative purpose underlying section 1717 . . . is to ensure that contractual
 6 attorney fee provisions are enforced evenhandedly." The simplest definition of
 7 evenhandedness has always been "equitable" and "dealing equitably with all." []
 8 Resort to the dictionary is instructive, but hardly necessary, because the
 9 identification of the party obtaining "a greater relief" itself requires an immediate
 10 assessment more equitable in nature than the checklist supplied by section 1032.

11 (Sears v. Baccaglio, *supra*, 60 Cal.App.4th at 1150-51, citations omitted.)

12 The court, upon noticed motion, shall determine who is the prevailing party on the
 13 contract. (Civ. Code, § 1717(b)(1).) The court also fixes the amount of reasonable attorneys' fees
 14 awarded to the prevailing party. (Civ. Code, § 1717(a).) The court has wide discretion in deter-
 15 mining which party has prevailed on a contract and in fixing the amount of fees awarded, and its
 16 determination will not be disturbed on appeal absent a clear abuse of discretion. (*Ajato, Inc. v.*
 17 *E*Trade Group, Inc.* (2005) 135 Cal.App.4th 21, 58.) Despite this considerable discretion, the
 18 court may not completely deny fees to the prevailing party. (*Texas Commerce Bank v. Garamendi*
 19 (1994) 28 Cal.App.4th 1234, 1247; *Hsu v. Abbara* (1995) 9 Cal.4th 863, 875.)

20 B. Plaintiffs Are Entitled to an Award of Their Attorneys' Fees, Litigation
 21 Expenses, and Costs Under the Contracts on Which They Prevailed.¹³

22 1. Plaintiffs Are Prevailing Parties Entitled to Recover Their Attorneys'
 23 Fees Under Section 1717 and the Clear Language of the Contracts.

24 Where a contract specifically provides that attorneys' fees and costs shall be awarded to
 25 the prevailing party in an action to enforce that contract, then the party who is determined to be
 26 the prevailing party on the contract *shall* be entitled to reasonable attorneys' fees. (Civ. Code,
 27 § 1717(a).) The 1993 Settlement Agreement provides that, in an action concerning the agreement
 28 or the rights and duties of Cohens or District thereunder (whether it be for damages, equitable or

¹³ As already set forth in Plaintiffs' Motion to Strike and Opposition to District's Motion to Tax, Plaintiffs are prevailing parties, entitled to their costs as of right under CCP § 1032 because B. Cohen obtained a net monetary recovery, and all Plaintiffs obtained significant equitable relief. Among such allowable costs are attorneys' fees when provided by contract. (Code Civ. Proc., § 1033.5(a)(10)(A).) Plaintiffs are entitled to their fees on this additional basis, separately and independently of Section 1717.

CRAA#41580683289.S

-6-

01/22/2007 11:18 FAX 925 833 4126

MILLER STARR

012

1 declaratory relief), the prevailing party *shall* be entitled to recover not only costs, but also reasonable *expenses* and *attorneys' fees*. (1993 S.A., ¶ 11.) The 1994 Lease also provides that attorneys' fees shall be awarded to the prevailing party. (1994 Lease, ¶ 18.M.) Accordingly, in this action to enforce District's obligations under the settlement agreement, the prevailing party is entitled to attorneys' fees, expenses, and costs.¹²

6 Section 1717 defines "prevailing party" as "the party who recovered *a greater relief in*
 7 *the action* on the contract." (Civ. Code, § 1717(b)(1), emph. added.) In determining who
 8 recovered the "greater relief," the court must *equitably* assess which party prevailed. (*Sears,*
 9 *supra*, 60 Cal.App.4th at 1151, citations omitted.) It is fundamental that a party may prevail even
 10 though it did not recover all the relief sought. (*Epstein v. Frank* (1981) 125 Cal.App.3d 111, 124
 11 ["As a general rule, where claims and counterclaims arise in connection with a contract
 12 containing an attorney's fees provision, the party who obtains a *favorable judgment* is deemed to
 13 be the prevailing party, *even though he did not successfully obtain all the relief which he*
 14 *sought in the action.*" Emph. added].)¹³

15 "Greater relief" does not necessarily mean monetary relief. (*Id.* at 399.) Specific performance,
 16 declaratory relief, and injunctive relief can all constitute "greater" relief, supporting an
 17 award of attorneys' fees to the party granted such relief.¹⁴ (See *Baugh v. Garl* (2006) 137
 18 Cal.App.4th 737, 742-43 [awarding \$200,000 in fees following judgment enjoining defendant
 19 from violating settlement]; *Texas Commerce Bank*, *supra*, 28 Cal.App.4th at 1238 [awarding fees
 20 to prevailing party in declaratory relief action]; *Hastings v. Matlock* (1985) 171 Cal.App.3d 826,
 21 834, 840-42 [awarding fees following judgment awarding specific performance of a settlement].)

22 ¹² When negotiating the settlement, B. Cohen insisted upon broad attorneys' fees provisions so
 23 that he would not find himself in the position of later having to pay for attorneys' fees and related
 24 expenses out of his own pocket if District again breached the 1976 Lease or settlement agree-
 25 ment. (B. Cohen decl., ¶¶ 8-9.) Use of the term "expenses" is significant, and denotes something
 26 in addition to "attorneys' fees" and "costs." It is a well established principle of contract
 27 construction that, if at all possible, meaning must be given to every word. (Civ. Code, § 1641.)

28 ¹³ "[L]itigation may involve a series of attacks on an opponent's case. The final ground of reso-
 29 lution may become clear only after a series of unsuccessful attacks. [Attorney fee] [c]ompen-
 30 sation is ordinarily warranted even for those unsuccessful attacks to the extent those attacks led to
 31 a successful claim." (*Acree v. General Motors Acceptance Corp.*, (2001) 92 Cal.App.4th 385,
 32 405.)

33 ¹⁴ This is because specific performance, declaratory relief, and injunctive relief are all remedies
 34 for a breach of contract, and obtaining such relief constitutes success on a contract claim. (*Baugh*
 35 *v. Garl* (2006) 137 Cal.App.4th 737, 742.)

CRAAA441384683389.5

-7-

01/22/2007 11:18 FAX 925 933 4120

MILLER STARR

013

1 In determining whether the plaintiffs obtained a greater relief in the action, the court
 2 should examine "the results of the action in relative terms: the general term 'greater' includes
 3 '[]]arger in size than others of the same kind' as well as 'principal' and '[s]uperior in quality.'"
 4 (*Jackson v. Homeowners Assn. Monte Vista Estates – East* (2001) 93 Cal.App.4th 773, 787.) The
 5 court should "'compare the relief awarded on the contract claim or claims with the parties'
 6 demands on those same claims and their litigation objectives as disclosed by the pleadings, trial
 7 briefs, opening statements, and similar sources.'" (*Id.*) The prevailing party determination is made
 8 by a comparison of the extent to which each party has succeeded and failed to succeed in its
 9 contentions. (*Id.*) "[T]he 'form of the judgment is not necessarily controlling, but must give way
 10 to equitable considerations.' [] *In determining litigation success, courts should respect*
 11 *substance rather than form, and to this extent should be guided by 'equitable considerations.'*"
 12 (*Hisu v. Abbara, supra*, 9 Cal.4th at 877.)

13 Here, the Cohens must fairly be regarded as the "winners" who succeeded to the greater
 14 extent on their contentions, recovered the greater relief in this action, and are therefore entitled to
 15 attorneys' fees. From the time District announced its intention to implement the interim shared-
 16 use plan, Plaintiffs' main objective was to establish that District was in breach and to force
 17 District to comply with its settlement agreement obligations. As Cohens' July, 2004 public entity
 18 claim letter explained, "*Olde Port's primary concern and demand is that the District do*
 19 *whatever needs to be done to comply with its legal obligations* without adversely affecting the
 20 contractual and legal rights of Olde Port and causing it further damages." (Coon decl., Ex. A,
 21 p. 3, emph. added.) At that time, Cohens did not request any money to compensate for
 22 Defendant's breaches, other than reimbursement of \$8,000 in fees. They simply demanded that
 23 District comply with its settlement obligations. (*Id.* at 4-5.) District denied breaching and would
 24 not comply with its obligations; after District's material breaches forced B. Cohen's fish
 25 processing business to close, Plaintiffs had no choice but to sue, and jointly filed a Complaint
 26 alleging nine causes of action with a common purpose: to remedy Defendant's breaches of its
 27 agreements to provide the required public parking and truck access, and to adequately repair and
 28 maintain the Pier. While Plaintiffs prudently pursued multiple forms of relief for District's

CRAA44158683389.5

-8-

MPA VS/O MOTION FOR ATTORNEYS' FEES

01/22/2007 11:19 FAX 925 933 4126

MILLER STARR

014

1 breaches of contract, their main litigation objective was always to establish and remedy
 2 District's wrongful breaches.

3 Liability was a huge issue in contention in this case. Defendant steadfastly denied liability
 4 on any of the contracts, and Plaintiffs were forced to prove liability to obtain any type of relief,
 5 whether legal or equitable. Accordingly, during the course of the litigation, Plaintiffs' primary
 6 concern remained District's breaches of the settlement agreement. Plaintiffs' 9/28/04 mediation
 7 brief, which identified District's relevant contract breaches to include breaches of its obligations
 8 to maintain and repair the Pier, to provide 17 to 20 public parking spaces at the end of the Pier, to
 9 enforce parking regulations and limitations, and to guarantee regular truck access, and to ensure
 10 quiet enjoyment of the premises demonstrated Plaintiffs' goal of compelling performance. (Coon
 11 decl., Ex. B, pp. 5, 10.) Plaintiffs' discovery requests served on District also focused on obtaining
 12 information relevant to the same breaches highlighted in the mediation brief. (Coon decl., ¶ 9.)

13 After more than 2 years of litigation during which Defendant stubbornly refused to ac-
 14 knowledge its breaches or offer to perform, Plaintiffs finally achieved their primary litigation goal
 15 of establishing District's liability and compelling District to comply with its obligations when the
 16 Court issued its SOD and entered Judgment granting both substantial past money damages and
 17 significant equitable relief in Plaintiffs' favor.¹⁵ Regarding future damages, Cohens obtained
 18 substantial equitable relief by the declaratory judgment and specific performance decree granting
 19 substantially all redress their lawsuit sought to achieve.¹⁶ The Court ordered District to comply

20 ¹⁵ This Judgment is "good news" to Plaintiffs since it establishes District's obligations and
 21 breaches and orders District to perform its obligations so that Plaintiffs will not suffer future
 22 damages from continuing breaches; it is all "bad news" to District, which must now pay B. Cohen
 23 money, finally acknowledge its liability, cure its material breaches by performing its contract
 24 obligations, and further substantially reduce the 1994 Lease rent it was previously entitled to
 25 collect from Cohens until it complies.

26 ¹⁶ While they prudently sought *alternative remedies* to redress future harm, oppression, wrong
 27 and injustice resulting from Defendant's continuing breaches, throughout the litigation Plaintiffs'
 28 primary goal remained enforcing the settlement. That Cohens did not succeed on all nine causes
 of action they alleged toward this end is immaterial. The Complaint sought redress District's
 breaches of contract. Moreover, this Court only denied certain claims because the relief
 thereunder would be duplicative and therefore unnecessary. For example, the Court did not grant
 separate relief for District's breach of the 1976 Lease because it was unnecessary given the other
 relief granted. (SOD, 3:11-19.) Nor did the Court grant injunctive relief because specific
 performance was sufficient relief. (SOD, 11:1-3[injunctive relief not necessary to achieve a just
 result after specific performance granted].) As noted above, even where some "attacks" are
 unsuccessful, when they lead to a successful claim, that is all that is required for an award of
 attorneys' fees. (See *Acree v. General Motors Acceptance Corp.*, *supra*, 92 Cal.App.4th at 405.)

CRAA1441581683389.3

9.

01/22/2007 11:19 FAX 925 833 4126

MILLER STARR

015

1 with its obligations to repair and maintain the walkways, provide at least 17 parking spaces,
 2 enforce parking, and ensure truck access that does not interfere with the guaranteed parking.
 3 From the outset, Plaintiffs' primary contention was that District was breaching those very
 4 obligations.¹⁷ (Coon decl., ¶¶ 7-10.) Meanwhile, District stonewalled and denied that it had any
 5 such obligations or that it failed to honor any obligations it may have had. (Coon decl., ¶ 10.) This
 6 fundamental dispute over liability was resolved resoundingly in Plaintiffs' favor.

7 In addition to achieving Plaintiffs' primary litigation objectives, the relief they obtained is
 8 greater by far than any relief supposedly granted to District. From the outset, District contended
 9 that it did not have and/or did not have to comply with its settlement obligations. This contention
 10 failed. District has now been ordered to comply with its material contractual obligations – a result
 11 it fought hard to avoid and one it has judicially admitted will be expensive and time-consuming
 12 for it.

13 District's claims for express and comparative indemnity were rejected on summary
 14 adjudication. District's claim for ejectment was also rejected in its entirety by the Court.
 15 District's additional contention that Plaintiffs owed full back rent plus late fees under the 1994
 16 Lease also failed. While the Court ordered that B. Cohen pay Defendant \$44,808.98 in back rent
 17 on the cross-complaint, this actually represented a huge success for B. Cohen on Defendant's
 18 breach of contract claim. The amount awarded was less than half of what Defendant demanded
 19 and excludes late fees. (B. Cohen decl., ¶ 20.) It is also less than B. Cohen's \$50,000 money
 20 damages award, giving B. Cohen the net monetary recovery on the 1994 Lease.¹⁸ While the Court
 21 granted declaratory relief partially in Cohen's favor, and partially for District, this relief is strictly
 22 derivative in nature and reflects District's overall defeat on its ejectment and breach of contract
 23 claims. When District's multiple failed claims and minimal relief are compared with Cohens'
 24 success in establishing liability and obtaining substantial equitable and monetary awards, it is
 25

26 ¹⁷ Those obligations were the material consideration for Plaintiffs' settlement and dismissal of the
 27 prior lawsuit and were, as this Court expressly found in the SOD, material to the value of the
 28 1994 Lease.

¹⁸ Moreover, the amount of future rent on the 1994 Lease is reduced by half until Defendant
 complies with the Judgment, a success for Plaintiffs, not District.

01/22/2007 11:19 FAX 925 933 4126

MILLER STARR

016

1 abundantly clear that Cohens obtained the "greater relief" in this action and are therefore
 2 prevailing parties contractually entitled to fees.¹⁹

3 Awarding Cohens their fees incurred in this action comports with the equitable nature of
 4 Section 1717. This is not the first time Cohens have had to file a lawsuit to force District to
 5 comply with its contractual (and public) obligations. A prior lawsuit between Cohens and District,
 6 filed to prevent District's threatened unlawful destruction of the historic Harford Pier canopy and
 7 Olde Port Inn restaurant in violation of the 1976 Lease and CEQA, resulted in issuance of a pre-
 8 liminary injunction against District and ultimately settled in Cohens' favor. (B. Cohen decl., ¶¶ 3-
 9 6; Coon decl., ¶ 2.) Despite their success, and the public benefit conferred, Cohens were not
 10 awarded fees because the 1976 Lease had no attorneys' fees clause. Now, Cohens have been
 11 forced to file another lawsuit to protect their contractual rights. Again, they were successful on
 12 the merits. This time, they are entitled to fees.

13 It is also equitable to award fees in this case, given that District consistently drove up the
 14 cost of litigation. (Coon decl., ¶¶ 6, 11.) It filed a massive but wholly meritless motion for
 15 summary adjudication, filed numerous improper and repetitive papers at all stages of this
 16 litigation, improperly attempted to use privileged tax returns, doubled the length of all Plaintiffs'
 17 depositions of District personnel and other witnesses by continuously (and meritlessly) objecting,
 18 noticed multitudes of individual and records depositions, and conducted discovery related to
 19 irrelevant issues (e.g., Plaintiffs' personal finances). (L. Cohen decl., ¶ 6; Coon decl., ¶ 11.)
 20 District's economic bullying tactics drove up the expense of the litigation significantly beyond
 21 anything Plaintiffs could reasonably have anticipated at the outset. (L. Cohen decl., ¶ 6.) As a
 22 result, Cohens have been forced to obtain large loans against their residences to finance their
 23 meritorious action, and are now forced to sell those residences as a result of the enormous
 24 expense of the litigation. (L. Cohen decl., ¶¶ 7-9.) The only equitable fee award is one which
 25 honors the parties' contracts, and is, accordingly, one of *all* Plaintiffs' litigation fees, costs and
 26 expenses.

27 ¹⁹ Even though B. Cohen also received the greater monetary relief, "greater relief" does not
 28 require greater monetary relief. (See *Acree v. General Motors Acceptance Corp.*, *supra*, 92
 Cal.App.4th at 399.) Plaintiffs' equitable relief alone warrants an award of attorneys' fees in this
 case.

CRAA#4415K683389.5

01/22/2007 11:19 FAX 925 833 4128 MILLER STARR

017

Under the broad language of the settlement agreement, the prevailing party shall recover not only "attorneys' fees", but reasonable "expenses" and "costs" as well. (1993 S.A., ¶ 11, emph. added.) Such reasonable expenses here include expert witness fees and the costs of computer legal research. Where a *contract* provides for recovery of *expenses* and attorneys' fees, expenses not allowed as *costs* under Sections 1032 may still be recovered as fees by the prevailing party. (*Bussey v. Affleck* (1990) 225 Cal.App.3d 1162, 1166.) "An agreement for attorneys' fees and costs would be less than effectual if it could not cover the actual costs of litigation, including disbursements of counsel, and a contrary conclusion would mean that the prevailing party on the contract could never be made whole." (*Id.* at 1166.) Thus, in *Bussey*, the court awarded expenses such as expert witness fees, photocopying charges, messenger charges, and telephone bills, finding that the items were expressly authorized by law in that Section 1717 provides parties may contract for the payment of attorneys' fees and costs and the parties had done so in that case. (*Id.* at 1167.) The court explained:

16 " [A]ttorneys' fees and expenses are inseparably intertwined as equally vital
17 components of the costs of litigation . . . [E]xpenditures such as supplemental
18 secretarial costs, copying, telephone costs and necessary travel, are integrally
related to the work of an attorney and the services for which outlays are made
may play a significant role in the ultimate success of litigation . . . "

19 (Id. at 1166.) To be recoverable, the expenses must represent “expenses ordinarily billed to a
20 client,” “not included in the overhead component of counsel’s hourly rate.” (Id. at 1166.)

21 Based on the broad language in the 1993 Settlement Agreement, which provides for recog-
22 nition of reasonable expenses, attorneys' fees, and costs, Plaintiffs, as prevailing parties in this
23 litigation, are entitled to recover expenses ordinarily billed to a client that were not included in the
24 overhead component of counsel's hourly rate. Accordingly, Plaintiffs should be awarded litiga-
25 tion expenses, such as expert witness fees, Westlaw expenses, photocopying, messenger
26 services, word processing, and the like, in this case. MSR ordinarily bills clients for such
27 litigation expenses, and the firm did so in this case. (Coon decl., ¶¶ 37-42.) Such expenses are not

01/22/2007 11:19 FAX 825 933 4126

MILLER STARR

018

1 included in the firm's overhead. (*Id.*) They are therefore recoverable under Section 1717 and
 2 *Bussey*.

3 C. Plaintiffs Are Entitled to the Full Amount of Fees and Litigation Expenses
 4 Sought.

5 1. Plaintiffs' Requested Attorneys' Fees Are Reasonable.

6 As prevailing parties in this litigation, Plaintiffs have requested \$1,847,180.00 in
 7 attorneys' fees. This figure is reasonable under the circumstances of this case, as demonstrated by
 8 the accompanying Declarations of Arthur F. Coon, Barry A. Cohen, Leonard A. Cohen, and
 9 Richard Carsel in support of this motion. In determining a reasonable fee, courts typically apply
 10 the lodestar formula, multiplying the number of hours reasonably expended by a reasonable rate.
 11 (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) The reasonable hourly rate is that
 12 prevailing in the community for similar work.²⁰ (*Id.*)

13 Here, MSR's billing statements reflect the lodestar formula. (Coon decl., Ex. C.) Plaintiffs
 14 were billed for attorney work on an hourly basis. This case demanded a substantial commitment
 15 of attorney hours. MSR litigated the case from the initial notice of public entity claim through
 16 jury trial, then equitable briefing and court trial, and finally statement of decision and judgment.
 17 All this required extensive litigation work, including, *inter alia*, preparation of a complaint, an
 18 answer, discovery requests and responses, two motions to compel, opposition to District's motion
 19 to compel, a motion for summary adjudication, opposition to District's motion for summary
 20 adjudication, two mediation briefs, numerous motions in limine, opposition to District's
 21 numerous motions in limine, and equitable briefing. The jury trial, from selection through verdict,
 22 also demanded substantial time and preparation. (Coon decl., §§ 6-10.)

23 MSR attorneys expended a reasonable number of hours on each task required, as
 24 demonstrated by the billing statements, which contain a general description of work performed.
 25 (Coon decl., Ex. C.) MSR also billed time at reasonable rates. MSR's rates are comparable to

26 ²⁰ The lodestar figure may be adjusted based on consideration of factors specific to the case,
 27 including the novelty and difficulty of the questions involved, the skill displayed in presenting
 28 them, the extent to which the nature of the litigation precluded other employment by the
 attorneys, and the contingent nature of the fee award. (*Id.*; *Graciano v. Robinson Ford Sales, Inc.*
 (2006) 144 Cal.App.4th 140, 154.) "Such an approach anchors the trial court's analysis to an
 objective determination of the value of the attorneys' services, ensuring that the amount awarded
 is not arbitrary." (*PLCM Group, Inc. v. Drexler*, *supra*, 22 Cal.4th at 1095.)

01/22/2007 11:20 FAX 925 933 4126

MILLER STARR

018

1 other similarly qualified San Francisco Bay Area firms, if not below market (Coon decl., ¶¶ 4-5,
 2 14-34, Carsel decl., ¶¶ 8, 11-12). While MSR's hourly rates are reasonable, the "effective rate"
 3 (the rate actually billed after discounts to the client²¹) is actually even lower than the hourly rate.²²

4 In this case, the reasonable hourly rate is properly calculated based on the rate prevailing
 5 in the San Francisco Bay Area for similar work. While the reasonable rate is sometimes deter-
 6 mined based on rates prevailing in the community where the service is rendered, it is proper in
 7 certain situations to award the rate prevailing in the community where the attorneys are based.
 8 (See *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1984; *Horsford v. Board of Trustees of Cal.*
 9 *State Univ.* (2005) 132 Cal.App.4th 359 [trial in Fresno; attorney received San Francisco Bay
 10 Area rates]; *City of Oakiana v. Oakland Raiders* (1988) 203 Cal.App.3d 78 [trial in Monterey;
 11 attorney received San Francisco Bay Area rates]; *Guam Soc'y of Obstetricians & Gynecologists*
 12 *v. Ada* (9th Cir. 1996) 100 F.3d 691 [case in Guam; New York attorneys received fees New York
 13 community rates].) Where local counsel lacks the necessary specialized skills or ability to handle
 14 a case, out-of-town counsel should recover the rates prevailing in their community.

15 Cohens hired MSR to handle this case because the firm had represented them in prior
 16 litigation involving the same parties and the 1976 Lease. (Carsel decl., ¶¶ 10-12; B. Cohen decl.,
 17 ¶ 11; L. Cohen decl., ¶ 3.) The prior case involved CEQA claims and lease, and a local San Luis
 18 Obispo attorney recommended MSR to Cohens because of the firm's unique expertise in those
 19 areas. (Carsel decl., ¶¶ 6-8.) MSR thereafter negotiated the settlement agreement at issue, so it
 20 was natural for Cohens to hire the same firm when District breached that very agreement. (B.
 21 Cohen decl., ¶ 11; L. Cohen decl., ¶ 3.) There was no other firm in the San Luis Obispo area as
 22 familiar with Cohens' position and businesses, the agreements, the case, and the issues as MSR.

23 ²¹ In this case, the lead attorney at MSR exercised considerable discretion and often reduced or
 24 wrote-off time. When possible, he gave Cohens a discount for the substantial work required to
 25 respond to District's bad faith and/or dilatory tactics, which drove up the number of hours re-
 26 quired far beyond anything Cohens or their attorneys could have reasonably anticipated. (Coon
 27 decl., ¶ 36.) The client was not billed for reduced and written off time, and while it would be just
 28 and reasonable to do so, Plaintiffs do not seek to recover it here.

22 Much of the work performed was necessitated by District's "war of attrition" litigation.
 23 Plaintiffs' attorneys were forced to spend substantial time responding to District's massive and
 24 wholly meritless motion for summary judgment, filing of improper and repetitive papers, attempt-
 25 ed use of privileged tax returns, drawing out depositions of District personnel unnecessarily and
 26 without support, and noticing multitudes of depositions and conducting discovery on irrelevant
 27 issues. (Coon decl., ¶ 11; L. Cohen decl., ¶ 6.)

CRAA#415868389.5

-14-

01/22/2007 11:20 FAX 925 833 4126

MILLER STARR

020

1 and, by hiring MSR, Cohens therefore saved substantial fees that would have otherwise been
 2 incurred for a new firm to "get up to speed." No local firm was as uniquely qualified, and had the
 3 depth and ability to handle this case, as MSR. Accordingly, it is reasonable to calculate Cohens'
 4 attorneys' fees based on reasonable San Francisco Bay Area market rates.

5 **2. Plaintiffs' Litigation Expenses Are Reasonable.**

6 Plaintiffs have also requested \$327,053.39 in litigation expenses. This amount is
 7 supported and reasonable. (Coon decl., Exs. C, D [billing statements].)²³

8 **IV. CONCLUSION**

9 This Court's Judgment and Statement of Decision grant B. Cohen money damages and all
 10 Plaintiffs substantial relief, and deny all District's claims, except its rent claim, which is cut in
 11 half and shorn of late fees. Plaintiffs prevailed by achieving their main litigation objective of
 12 establishing District's liability, and enforcing the settlement, and they obtained the greater relief
 13 on the contracts under Section 1717. Plaintiffs are therefore entitled to recover their reasonable
 14 attorneys' fees in the amount of \$1,847,180.00, and reasonable litigation expenses in the amount
 15 of \$327,053.39.

16 Respectfully submitted,

17 Dated: January 22, 2007 MILLER, STARR & REGALIA

18 By:

19 ARTHUR F. COON
 20 Attorneys for Plaintiffs,
 21 BARRY A. COHEN, LEONARD A.
 22 COHEN, OLDE PORT INN, INC., and
 23 OLDE PORT FISHERIES, INC.

24
 25
 26 ²³ Of the litigation expenses claimed, \$53,215.86 is for Westlaw expenses. This amount is
 27 reasonable, particularly in light of the many motions and corresponding research required by this
 28 case (i.e., motions for summary judgment, motion for a protective order, motions in limine,
 equitable briefing, etc.), often required as a result of District's litigation tactics. In modern legal
 practice computer legal research is an imperative tool. Accordingly, this Court should grant
 Plaintiffs' Westlaw fees and other litigation expenses.
 CIV044158683380

01/22/2007 11:20 FAX 925 933 4126

MILLER STARR

021

PROOF OF SERVICE

(*Barry A. Cohen, et al. v. Port San Luis Harbor District*
 San Luis Obispo Superior Court, Case No. CV 040897)

I, Karen Irias, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 1331 N. California Blvd., Fifth Floor, Post Office Box 8177, Walnut Creek, CA 94596. On January 22, 2007, I served the within documents:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
 PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND LITIGATIONS EXPENSES AND
 COSTS

- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- by transmitting via electronic e-mail, to the following e-mail addresses indicated below on this date before 5:00 p.m.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Walnut Creek, California addressed as set forth below.
- by placing the document(s) listed above in a sealed _____ envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a _____ agent for delivery.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

Martin P. Moroski
 Adamski, Moroski, Madden & Green
 P. O. Box 3835
 San Luis Obispo, CA 93403-3835
 Tel: (805) 543-0990
 Fax: (805) 543-0980
 e-mail:
moroski@adamskimoroski.com

Overnight/Hand Delivery Only:
 6633 Bay Laurel Place
 Avila Beach, CA 93424

Attorneys for Defendant and Cross-
 Complainant PORT SAN LUIS
 HARBOR DISTRICT

David M. Cumberland
 Cumberland, Coates & Duenow, LLP
 550 Dana Street
 San Luis Obispo, CA 93401-3429
 Tel: (805) 541-4200
 Fax: (805) 541-4293
 e-mail: dmc@ccdlawfirm.com

Counsel for Defendant and Cross-
 Complainant PORT SAN LUIS
 HARBOR DISTRICT

01/22/2007 11:20 FAX 925 933 4126

MILLER STARR

0022

1 Courtesy Copy:

2 Hon. Barry T. LaBarbera
3 San Luis Obispo Superior Court
4 Department 2
5 1035 Palm St., 3rd Fl.
6 San Luis Obispo, CA 93408
7 e-mail:
8 Barry.LaBarbera@slo.courts.ca.gov

9 I am readily familiar with the firm's practice of collection and processing
10 correspondence for mailing. Under that practice it would be deposited with the U.S. Postal
11 Service on that same day with postage thereon fully prepaid in the ordinary course of business. I
12 am aware that on motion of the party served, service is presumed invalid if postal cancellation
13 date or postage meter date is more than one day after date of deposit for mailing in affidavit.

14 I declare under penalty of perjury under the laws of the State of California that the
15 foregoing is true and correct.

16 Executed on January 22, 2007, at Walnut Creek, California.



Karen Irias

CRAA441581683389.5

-17-

MPA US/O MOTION FOR ATTORNEYS' FEES

01/22/2007 11:03 FAX 925 933 4126

MILLER STARR

002

1 GEORGE B. SPEIR (Bar No. 78276)
 2 ARTHUR F. COON (Bar No. 124206)
 3 CAROLYN E. NELSON (Bar No. 238526)
 MILLER STARR REGALIA
 A Professional Law Corporation
 1331 N. California Blvd., Fifth Floor
 Post Office Box 8177
 Walnut Creek, California 94596
 Telephone: 925 935 9400
 Facsimile: 925 933 4126
 Attorneys for Plaintiffs
 BARRY A. COHEN, LEONARD A. COHEN,
 OLDE PORT INN, INC., and OLDE PORT
 FISHERIES, INC.

FILED

JAN 22 2007

SAN LUIS OBISPO SUPERIOR COURT
 BY Nancy G. Girdino
 N. Girdino, Deputy Clerk

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SAN LUIS OBISPO

BY FAX

12 BARRY A. COHEN; LEONARD A. COHEN; OLDE PORT INN, INC.; and OLDE PORT FISHERIES, INC. Case No. CV 040897
 13 Plaintiffs. DECLARATION OF ARTHUR F. COON IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES
 14
 15 Date: February 21, 2006
 Time: 9:00 a.m.
 Judge: Hon. LaBarbera
 Location: 801 Grand Avenue
 San Luis Obispo, CA
 16 PORT SAN LUIS HARBOR DISTRICT; and DOES 1 to 50, inclusive, Defendants.
 17
 18 Defendants.

19 AND RELATED CROSS-ACTION.

20
 21 I, Arthur F. Coon, declare:
 22
 23 1. I am an attorney at law duly licensed to practice before the courts of the
 State of California, and I am a shareholder in the law firm of Miller, Starr & Regalia ("MSR"),
 attorneys for Plaintiffs Barry A. Cohen, Leonard A. Cohen, Olde Port Inn, Inc., and Olde Port
 Fisheries, Inc. ("Plaintiffs" or "Cohens") in the above-captioned action. Unless stated on
 information and belief, in which case I am informed and believe them to be true, the facts stated in
 this declaration are true as of my own personal knowledge and, if called as a witness, I could
 24
 25
 26
 27
 28

CRAA\44158\683410.2

-1-

01/22/2007 11:03 FAX 825 933 4126

MILLER STARR

003

1 competently testify thereto.

2 2. Barry Cohen first hired MSR to represent him and his family businesses in
 3 or about January 1991. MSR was retained at that time to prevent Defendant Port San Luis Harbor
 4 District's ("District") threatened unlawful destruction of the historic Harford Pier canopy, which
 5 would have resulted in structural and financial damages to the Olde Port Inn restaurant, in
 6 violation of the California Environmental Quality Act ("CEQA") (Pub. Resources Code, §§
 7 21000, et seq.) and Barry Cohen's 1976 Lease with District. MSR is recognized in the legal and
 8 real estate communities as one of the (if not the) premiere real property specialty law firms in the
 9 State of California. The firm literally wrote (and continues to write) the book on real estate law –
 10 Miller & Starr, California Real Estate 3d edition – and its members specialize in all aspects of the
 11 subject matter, including land use, CEQA and landlord-tenant law. I am coauthor and continue
 12 (since Harry Miller's death) as author of the "Subdivisions" chapter of the Miller & Starr treatise,
 13 which covers, *inter alia*, CEQA and land use law. George B. Speir and I were the lead attorneys
 14 on the case ("Cohen I"). We filed a lawsuit on behalf of Cohens, and obtained a preliminary
 15 injunction from the court enjoining the District's illegal action. After substantial further litigation,
 16 the case eventually settled, resulting in a settlement agreement encompassing the 1993 Settlement
 17 Agreement and subsequent 1994 Lease. George Speir, for Cohens, on the one hand, and Ty
 18 Green, for District's representatives, on the other hand, as well as the principals, negotiated the
 19 1993 Settlement Agreement and 1994 Lease, which contain the terms of the settlement.

20 3. In 2004, Cohens again retained MSR to represent them because District was
 21 breaching and refused to honor its agreements in the 1993 Settlement Agreement and 1994 Lease
 22 to provide required public parking and truck access, and to adequately repair and maintain the
 23 Pier. We tried for months – unsuccessfully – to resolve the case without litigation. I made a
 24 personal appearance before the District's Commissioners at a meeting to attempt to persuade them
 25 to comply with their agreements and their Master Plan, including its Coastal Act policies, but to
 26 no avail.

27 4. When Cohens initially retained MSR in 2004, I sent a fee agreement to
 28 Cohens. The fee agreement, signed by Barry Cohen, Leonard Cohen, and myself, stated that MSR
 CRAA\44138\683410.2

01/22/2007 11:03 FAX 925 933 4126

MILLER STARR

004

1 customarily charges an hourly fee for legal services, and that Cohens would be billed our standard
2 hourly rates. The agreement stated that the rates for paralegals at that time ranged between \$100
3 and \$175 per hour, and the rates for attorneys at that time ranged between \$175 and \$415 per hour
4 depending on level of experience. The agreement stated that the firm's rates are reviewed and
5 may be adjusted each year. The fee agreement also provided that MSR would charge Cohens, in
6 addition to attorneys' fees, for other costs and expenses associated with litigation (but which are
7 not included in overhead) including, *inter alia*, expert consultants and computerized research.

8 5. During the course of the litigation, which has now lasted over two years, the
9 firm's rates were reviewed and adjusted, as provided in the fee agreement. The rates were raised
10 to more accurately reflect market rates at comparable firms in the San Francisco Bay Area. As of
11 the date of this declaration, the current rate for paralegals ranges between \$100 and \$175 per hour,
12 and the rates for attorneys range between \$200 and \$500 per hour, depending on level of
13 experience.

14 6. This case demanded a substantial commitment of attorney hours, especially
15 because of the District's attorneys' manner of litigating it. MSR litigated the case from the initial
16 notice of public entity claim through discovery and motion practices, extremely substantial
17 deposition discovery, disposition motions, jury trial, briefing and argument on equitable claims,
18 statement of decision and judgment, and finally the post-judgment proceedings now occurring.
19 During the course of the litigation, this firm prepared, *inter alia*, a complaint, an answer to
20 District's cross-complaint, discovery requests, discovery responses, at least two motions to compel
21 (including a successful motion to compel return of privileged tax returns), opposition to District's
22 motion to compel, a successful motion for summary adjudication, a successful opposition to
23 District's meritless motion for summary adjudication, a joinder in the California Business,
24 Transportation & Housing Agency's successful motion to quash District's subpoena, and two
25 mediation briefs. This case involved approximately 30 depositions, which consumed a total of
26 approximately 59 days. District took approximately 60 percent of these depositions, and
27 consumed approximately 60 percent of the total deposition days; it also substantially increased the
28 length of the depositions taken by Plaintiffs through repeated objections, speaking objections, and

CRAAA441584683410.2

-3-

01/22/2007 11:04 FAX 925 933 4126

MILLER STARR

005

1 even coaching the witnesses. I am informed and believe that approximately 60 document
2 subpoenas were also served. In preparation for and at trial, this firm prepared a trial brief, motions
3 in limine, numerous oppositions to District's motions in limine, proposed jury instructions,
4 proposed verdict forms, a successful opposition to District's motion(s) for directed verdict, and
5 various supplemental briefs either requested by the Court or in response to briefs filed by District.
6 The jury trial began on May 8, 2006 and the jury announced its verdict on or about June 21, 2006,
7 with over 20 witnesses and hundreds of exhibits being presented. After the jury portion of the trial
8 ended, this firm prepared further extensive briefing to the Court on Cohens' reserved equitable
9 claims, including a motion for relief on equitable relief claims, an opposition to District's motion
10 for relief on its cross-complaint, a reply to District's opposition to Plaintiffs' motion for relief on
11 equitable relief claims, a supplemental brief regarding Plaintiffs' motion for relief on equitable
12 claims, a reply to District's supplemental brief regarding Plaintiffs' equitable claims, a request for
13 statement of decision, a supplemental request for statement of decision, objections to District's
14 response to Court's tentative decision and request for a supplemental statement of decision, a
15 proposed judgment, a response to District's objections to Plaintiffs' proposed judgment, and
16 objections to District's proposed judgment, as well as more informal, successful pleas to the Court
17 requesting that it clarify that the judgment following jury verdict was interlocutory in nature and
18 that the Court correct inaccuracies in the proposed judgment submitted by District. This firm also
19 prepared extensive correspondence and email correspondence to the Court and counsel. The firm
20 has also prepared a memorandum of costs, motion to strike District's memorandum of costs,
21 alternative motion to tax District's memorandum of costs, opposition to District's motion to tax
22 Plaintiffs' memorandum of costs, and the instant motion for attorneys' fees, and related exhibits
23 and papers. Before the litigation is over, the firm anticipates preparing a reply to District's
24 opposition to Plaintiffs' motions to strike and (alternatively) to tax, an opposition to District's
25 motion for attorneys' fees, a reply to District's opposition to Plaintiffs' motion for attorneys' fees,
26 and a reply to District's opposition to Plaintiffs' motion for prejudgment interest, as well as
27 arguing at at least two hearings (unless they are consolidated by the Court), *inter alia*.

28 7. Attached hereto as Exhibit "A" is a true and correct copy of Plaintiffs'

CRAAM4158683410.2

-4-

DECL. OF ARTHUR F. COON I/S/O MOTION FOR ATTORNEYS' FEES

01/22/2007 11:04 FAX 925 933 4126

MILLER STARR

006

1 public entity claim letter dated July 2, 2004. Rather than requesting money to compensate for
 2 District's breaches (other than reimbursement of the minimal \$8,000 in attorneys' fees then
 3 incurred), the letter simply demanded that District comply with its contractual settlement
 4 obligations to provide and manage the required parking and truck access, and comply with its
 5 continuing obligation to maintain the Pier (including decking surfaces). (Public Entity Claim,
 6 p. 4-5.) "*Olde Port's primary concern and demand is that the District do whatever needs to be*
 7 *done to comply with its legal obligations* without adversely affecting the contractual and legal
 8 rights of Olde Port and causing it further damages." (*Id.*, p. 3, emph. added.) Anticipating District
 9 would claim complying with its contracts was impossible or too costly, Cohens suggested –
 10 though they had no obligation to – how District might reconfigure the Pier terminus to meet its
 11 legal obligations. *and even offered to advance up to \$20,000 to help District pay for the*
 12 *necessary work.* (*Id.*, p. 5.)

13 8. Attached hereto as Exhibit "B" is a true and correct copy of Plaintiffs'
 14 Mediation Brief dated September 28, 2004. The brief identifies District's relevant contract
 15 breaches to include breaches of the obligations to maintain and repair the Pier, to make best efforts
 16 to provide 20, but at least 17, public parking spaces at the end of the Pier, to enforce parking
 17 regulations and limitations, to guarantee regular truck access, and to ensure quiet enjoyment of the
 18 premises.

19 9. Plaintiffs' discovery requests served on District also focused on obtaining
 20 information relevant to establishing District's breaches of its obligations to maintain and repair the
 21 Pier, to make best efforts to provide 20, but at least 17, public parking spaces at the end of the
 22 Pier, to enforce parking regulations and limitations, to guarantee regular truck access, and to
 23 ensure quiet enjoyment of the premises.

24 10. From the outset, Plaintiffs' primary contention was that District breached its
 25 obligations to maintain and repair the Pier, to make best efforts to provide 20, but at least 17,
 26 public parking spaces at the end of the Pier, to enforce parking regulations and limitations, to
 27 guarantee regular truck access, and to ensure quiet enjoyment of the premises. This is
 28 demonstrated by Plaintiffs' public entity claim, complaint, mediation brief, and discovery

CRAAV44158463410.2

-5-

DECL. OF ARTHUR F. COON V/S/O MOTION FOR ATTORNEYS' FEES

01/22/2007 11:04 FAX 923 933 4126

MILLER STARR

007

1 requests. Throughout the litigation, District stonewalled and claimed it did not breach any
2 obligations.

3 11. During the course of the litigation, District engaged in dilatory and bad faith
4 tactics, exceeded the permissible scope of discovery, requested continuances of the trial date, and
5 unnecessarily multiplied these proceedings. As an example, Plaintiffs' attorneys were forced to
6 spend substantial time responding to District's massive and wholly meritless motion for summary
7 adjudication, which contained approximately 41 attached exhibits and listed 14 issues and
8 approximately 34 "facts" in its separate statement of "undisputed" material facts, even though the
9 material facts were clearly in dispute and required a trial if the case did not settle. The sheer size
10 of the motion did not vitiate the fact that it was entirely without merit, however, and the Court
11 denied District's motion for summary adjudication in its entirety. Confronted with Defendant's
12 meritless Cross-Complaint's indemnity causes of action, Plaintiffs successfully obtained summary
13 adjudication disposing of these claims. Plaintiffs were also forced to respond to improper and
14 repetitive papers filed by District, such as District's unauthorized objections to the Court's Final
15 Statement of Decision. Discovery was also drawn out and rendered more time-consuming and
16 expensive as a result of District's dilatory tactics—depositions of District personnel were
17 unnecessarily drawn out by District's repeated, unsupported objections (including speaking
18 objections) and witness coaching, and District noticed a multitude of depositions and conducted
19 discovery on irrelevant issues, to which Plaintiffs were forced to respond. District also even
20 improperly retained and attempted to use inadvertently produced (by a third party) privileged tax
21 returns, denying Plaintiffs' demands for their return, and requiring Plaintiffs to seek a protective
22 order before Judge Crandall (which Plaintiffs did and successfully obtained), and to file additional
23 motions in limine. As a result of these and other dilatory and bad faith tactics on District's part,
24 Plaintiffs' attorneys were required to spend far more hours on this case than would have been the
25 case had District not engaged in such tactics.

26 12. Attached hereto as Group Exhibit "C" are true and correct copies of relevant
27 portions of billing statements generated by MSR's accounting department in the ordinary course
28 of business and sent by MSR to Plaintiffs in this matter, covering the period from October 1, 2004

CRAAW4158683410.2

-6-

DECL. OF ARTHUR F. COON IN/S/O MOTION FOR ATTORNEYS' FEES

01/22/2007 11:04 FAX 925 933 4126

MILLER STARR

008

1 to December 31, 2006. The billing statements are redacted to protect attorney-client privileged
 2 and work product protected communications, while providing sufficient information regarding the
 3 services rendered to demonstrate they were actually and reasonably incurred in this case. (The
 4 submission of these statements in redacted form is made to carry Plaintiffs' burden to produce
 5 competent evidence in support of their motion and is not, is not intended, and shall not be deemed
 6 or construed to be a waiver of this privilege or protection with respect to any entry,
 7 communication or matter mentioned or referred to therein or relating thereto.) The billing
 8 statements include the date on which work was performed, the attorney who performed the work,
 9 the amount of time spent, at which hourly rate, a general description of the services performed,
 10 and the amount billed to the clients. The billing statements also reflect client discounts, which, as
 11 explained in more detail below, were frequently given by MSR as a courtesy or accommodation to
 12 the Cohens to reduce the total amount of fees and/or costs incurred and due in any given period.

13. The billing statements in Group Exhibit "C" demonstrate that, over the
 14 more than two-year course of this litigation, the following MSR attorneys billed significant time to
 15 the above-captioned case: shareholders Arthur F. Coon and George B. Speir, associates Dana C.
 16 Tsubota, Stacey C. Wright, Gavin D. Whitis, Carolyn E. Nelson, and Stephen E. Velyvis, and
 17 shareholder Thomas S. McConnell. The following MSR paralegals worked on and billed
 18 significant time to the above-captioned case: Arlene J. Deguzman, Matthew T. Holman, Sheriell
 19 L. Green, Frank Z. Khalil, and David A. Villanueva. The following MSR summer law clerks
 20 worked on the above-captioned case: Stephanie A. Butori and Kristin B. Hood. The following
 21 case clerks worked on and billed significant time to the above-captioned case: Theodore E. Geier,
 22 Terri C. Pangelina, Carol L. Davis, and Ruth Beckett.

23. I have been practicing law for over 20 years. I am a shareholder at MSR
 24 and have been since 1993. My litigation practice includes a broad range of real property, land use,
 25 and environmental litigation, with special emphasis on land use litigation against (and on behalf
 26 of) public agencies, and the California Environmental Quality Act ("CEQA"). I was admitted to
 27 practice law in California in December 1986. George Speir and I were the attorneys in the prior
 28 litigation involving Cohens and District, which resulted in the settlement agreement that is the

CRAAW4158483410.2

-7-

01/22/2007 11:04 FAX 025 933 4126

MILLER STARR

009

1 subject of this litigation. Barry Cohen called me to retain MSR again when District was
2 threatening and/or committed the breaches established in this case. I was the lead attorney with
3 day to day responsibility on this case, and over the course of the approximately two and one-half
4 years of this litigation engagement, as reflected by the bills I have billed approximately 1874.2
5 hours for a total of \$742,036.50 (effective rate of \$395.92 per hour). I also billed approximately
6 6.7 hours for a total of \$2479.00 (effective rate of \$370.00 per hour) preparing the public entity
7 claim necessary to file this lawsuit. The statements reflecting the charges for the public entity
8 claim work are dated July 1, 2004 and August 1, 2004, and are attached hereto as Group Exhibit
9 "D". My current standard hourly rate is \$475 per hour. My "effective rate" in this case was
10 considerably less than my current hourly rate throughout the course of this case due in large part to
11 client discounts given in the firm's discretion as a courtesy or accommodation. I personally
12 reviewed all the bills in this case before they were sent. I am informed and believe that the bills
13 for my work in this case were reasonable and competitive or below market rate for civil litigators
14 of comparable skill and experience in the San Francisco Bay Area. My role in this litigation
15 included day to day case management, defending and taking key depositions, preparing, opposing
16 and arguing the various summary adjudication motions, trial brief, motions in limine, trial and
17 witness preparation and substantial equitable briefing following the jury trial. I also tried the jury
18 portion of the case with George Speir, including arguing motions in limine, making opening and
19 closing statements, and examining and cross-examining witnesses.

20 15. George B. Speir is a senior shareholder of MSI, with substantial
21 commercial and business litigation and trial experience. Mr. Speir has been practicing law for
22 over 30 years and was admitted to practice law in California in 1977. Mr. Speir was lead trial
23 counsel, and conducted voir dire exclusively, due to his significant jury trial experience. Over the
24 course of the litigation and trial in this case, as reflected by the bills Mr. Speir billed
25 approximately 738.4 hours for a total of \$307,184.00 (effective rate of \$416.01 per hour). I am
26 informed and believe that his current standard hourly rate is \$500 per hour. His "effective rate" in
27 this case was considerably less than his current hourly rate due in large part to client discounts
28 given in the firm's discretion as a courtesy or accommodation. I am informed and believe that the

CRAA#441584683-10.2

8

DECL. OF ARTHUR F. COON IN/O MOTION FOR ATTORNEYS' FEES

01/22/2007 11:04 FAX 925 933 4126

MILLER STARR

0010

1 bills for his work were reasonable and competitive or below market rate for civil litigators of
2 comparable skill and experience in the San Francisco Bay Area. In addition to Mr. Speir's role in
3 this litigation as lead trial counsel, he was also primarily responsible for retention and preparation
4 of expert witnesses and responding to District's rent demand and notice of termination.

5 16. Dana C. Tsubota is a litigation associate at MSR. Ms. Tsubota was
6 admitted to practice law in California in 2002. Over the course of the litigation, as reflected by the
7 bills Ms. Tsubota billed approximately 523.6 hours for a total of \$99,472.00 (effective rate of
8 \$189.98 per hour). I am informed and believe that Ms. Tsubota's current standard hourly rate is
9 \$275 per hour. Her "effective rate" in this case was considerably less than her current hourly rate
10 due in large part to client discounts given in the firm's discretion as a courtesy or accommodation.
11 I am informed and believe that the bills for her work were reasonable and competitive or below
12 market rate for civil litigators of comparable skill and experience in the San Francisco Bay Area.
13 Ms. Tsubota was responsible for the review and production of documents and preparing written
14 discovery and motions to compel.

15 17. Gavin D. Whitis is a litigation associate at MSR. Mr. Whitis has been
16 practicing law for over 10 years and was admitted to practice law in California in 1996.
17 Mr. Whitis was assigned to assist in this case when Ms. Tsubota went on leave. Over the course
18 of the litigation and trial, as reflected by the bills Mr. Whitis billed approximately 1049.5 hours for
19 a total of \$327,222.00 (effective rate of \$320.96 per hour). His current standard hourly rate is
20 \$350 per hour. His "effective rate" in this case was considerably less than his current hourly rate
21 due in large part to client discounts given in the firm's discretion as a courtesy or accommodation.
22 I am informed and believe that the bills for his work were reasonable and competitive or below
23 market rate for civil litigators of comparable skill and experience in the San Francisco Bay Area.
24 Mr. Whitis was responsible for discovery, depositions, third party subpoenas, motions to compel
25 and for protective orders, motions in limine, and research under my direction.

26 18. Carolyn E. Nelson is a litigation associate at MSR.¹ Ms. Nelson was

27 28 ¹ Ms. Nelson recently married and is in the process of officially changing her name to Carolyn
Nelson Rowan. Her initials appear as "CEN" and "CNR" on the statements. Her original name
still appears on pleadings, as that is the name currently on record with the State Bar.
CRAA44158663410.2 -9-

01/22/2007 11:05 FAX 925 933 4126

MILLER STARR

011

1 admitted to practice law in California in 2005. Over the course of the litigation, as reflected by the
2 bills Ms. Nelson billed approximately 315.6 hours for a total of \$58,413.50 (effective rate of
3 \$185.09 per hour). Her current standard hourly rate is \$225 per hour. Her "effective rate" in this
4 case was considerably less than her current hourly rate due in large part to client discounts given
5 in the firm's discretion as a courtesy or accommodation. I am informed and believe that the bills
6 for her work were reasonable and competitive or below market rate for civil litigators of
7 comparable skill and experience in the San Francisco Bay Area. Ms. Nelson was responsible for
8 conducting research under my direction, preparing motions in limine, support in briefing equitable
9 claims, and preparing motions to strike and tax District's cost memorandum and this motion for
10 attorneys' fees.

11 19. Stacey L. Wright was formerly a litigation associate at MSR. Ms. Wright
12 has since left employment with the firm. Over the course of the litigation, as reflected by the bills
13 Ms. Wright billed approximately 23.3 hours for a total of \$3,836.00 (effective rate of \$164.64 per
14 hour). Her "effective rate" in this case was considerably less than the current hourly rate charged
15 for third year MSR associates due in large part to client discounts given in the firm's discretion as
16 a courtesy or accommodation. I am informed and believe that the bills for her work were
17 reasonable and competitive or below market rate for civil litigators of comparable skill and
18 experience in the San Francisco Bay Area. Ms. Wright was responsible for research under my
19 direction related to the motion for summary judgment and discovery issues.

20 20. Stephen E. Velyvis is a litigation associate at MSR. Mr. Velyvis was
21 admitted to practice law in California in 1999. Over the course of the litigation, as reflected by the
22 bills Mr. Velyvis billed approximately 63.3 hours for a total of \$17,473.50 (effective rate of
23 \$276.04 per hour). His current standard hourly rate is \$320. His "effective rate" in this case was
24 less than his current hourly rate due in large part to client discounts given in the firm's discretion
25 as a courtesy or accommodation. I am informed and believe that the bills for his work were
26 reasonable and competitive or below market rate for civil litigators of comparable skill and
27 experience in the San Francisco Bay Area. Mr. Velyvis was responsible for research related to
28 District's Code of Civil Procedure section 998 offers to compromise, preparation of objections to

CRAAW41586834102

-10-

01/22/2007 11:05 FAX 925 933 4126

MILLER STARR

012

1 same, preparation of motions in limine and objections to District's motions in limine, and research
 2 under my direction.

3 21. Thomas S. McConnell is a litigation shareholder at MSR, focusing on real
 4 estate matters, landlord/tenant and leasing and business disputes. Mr. McConnell has been
 5 practicing nearly 20 years and was admitted to practice law in California in 1987. Over the course
 6 of the litigation, as reflected by the bills Mr. McConnell billed approximately 2.1 hours for a total
 7 of \$585.00 (effective rate of \$278.57 per hour). His current standard hourly rate is \$430 per hour.
 8 His "effective rate" in this case was considerably less than his current hourly rate due in large part
 9 to client discounts given in the firm's discretion as a courtesy or accommodation. I am informed
 10 and believe that the bills for his work were reasonable and competitive or below market rate for
 11 civil litigators of comparable skill and experience in the San Francisco Bay Area. Mr. McConnell
 12 was consulted briefly for assistance in the legal analysis of issues related to his landlord/tenant,
 13 unlawful detainer practice area, specifically issues regarding the legality and propriety of District's
 14 notice of termination for nonpayment of rent and its ejectment claim.

15 22. Stephanie A. Butori was a second year law student at the University of
 16 California, Hastings, employed as a summer associate at MSR from June 2006 to August 2006.
 17 Over the course of the litigation, as reflected by the bills Ms. Butori billed approximately 19.6
 18 hours for a total of \$1025.00 (effective rate of \$52.30 per hour). The current hourly rate for a
 19 summer law clerk is \$150. Her "effective rate" in this case was considerably less than her
 20 standard hourly rate due in large part to client discounts given in the firm's discretion as a courtesy
 21 or accommodation. I am informed and believe that the bills for her work were reasonable and
 22 competitive or below market rate for paralegals of comparable skill and experience in the San
 23 Francisco Bay Area. Ms. Butori's responsibilities were primarily research and analysis regarding
 24 District's cross-complaint.

25 23. Kristin B. Hood was a second year law student at the University of
 26 California, Los Angeles, employed as a summer associate at MSR from June 2006 to August
 27 2006. Over the course of the litigation, as reflected by the bills Ms. Hood billed approximately
 28 53.20 hours for a total of \$5085.00 (effective rate of \$95.58 per hour). The current hourly rate for

CRAA4415846834102

-11-

01/22/2007 11:05 FAX 925 933 4126

MILLER STARR

013

1 a summer law clerk is \$150. Her "effective rate" in this case was considerably less than her
 2 standard hourly rate due in large part to client discounts given in the firm's discretion as a courtesy
 3 or accommodation. I am informed and believe that the bills for her work were reasonable and
 4 competitive or below market rate for paralegals of comparable skill and experience in the San
 5 Francisco Bay Area. Ms. Hood's responsibilities were primarily research and analysis regarding
 6 District's 998 offers.

7 24. Arlene J. Deguzman was a paralegal at MSR and was the primary paralegal
 8 assigned to this case during her tenure at the firm. Ms. Deguzman no longer works at this firm.
 9 Over the course of the litigation, as reflected by the bills Ms. Deguzman billed approximately
 10 850.5 hours for a total of \$97,907.50 (effective rate of \$115.12 per hour). Her "effective rate" in
 11 this case was considerably less than the current hourly rate for a paralegal with her experience due
 12 in large part to client discounts given in the firm's discretion as a courtesy or accommodation. I
 13 am informed and believe that the bills for her work were reasonable and competitive or below
 14 market rate for paralegals of comparable skill and experience in the San Francisco Bay Area. Ms.
 15 Deguzman was responsible for much of the paralegal work in this matter, including case file and
 16 computer data base management, preparation and organization of documents, coordination of
 17 document productions, management of deposition transcripts, preparation and organization of
 18 deposition exhibits and deposition calendar, trial preparation, and research.

19 25. Matthew T. Holman was a paralegal at MSR. Mr. Holman no longer works
 20 at this firm. Over the course of the litigation, as reflected by the bills Mr. Holman billed
 21 approximately 88.2 hours for a total of \$10,337.50 (effective rate of \$117.21 per hour). His
 22 "effective rate" in this case was considerably less than the current hourly rate for a paralegal with
 23 his experience due in large part to client discounts given in the firm's discretion as a courtesy or
 24 accommodation. I am informed and believe that the bills for his work were reasonable and
 25 competitive or below market rate for paralegals of comparable skill and experience in the San
 26 Francisco Bay Area. Mr. Holman was responsible for preparation and organization of documents,
 27 deposition preparation, and preparation and organization of deposition exhibits.

28 26. Sherrell L. Green was a case clerk, and is now a paralegal at MSR. At the

01/22/2007 11:05 FAX 925 933 4126

MILLER STARR

14

1 At the outset of the litigation, Ms. Green was a case clerk. During the course of the litigation, Ms. Green
2 was promoted to paralegal. Over the course of the litigation, as reflected by the bills Ms. Green
3 billed approximately 363.5 hours for a total of \$26,337.50 (effective rate of \$72.46 per hour). Her
4 current standard hourly rate is \$100 per hour. Her "effective rate" in this case was considerably
5 less than her current hourly rate due in large part to client discounts given in the firm's discretion
6 as a courtesy or accommodation. I am informed and believe that the bills for her work were
7 reasonable and competitive or below market rate for paralegals of comparable skill and experience
8 in the San Francisco Bay Area. As paralegal, Ms. Green was responsible for preparation and
9 management of documents and trial preparation. As case clerk, she was responsible for organizing
10 various documents, including pleadings, correspondence, and client documents.

11 27. Frank Z. Khalil is a paralegal at MSP. Over the course of the litigation, as
12 reflected by the bills Mr. Khalil billed approximately 465.6 hours for a total of \$64,099.50
13 (effective rate of \$137.67 per hour). His current standard hourly rate is \$175 per hour. His
14 "effective rate" in this case was considerably less than his current hourly rate due in large part to
15 client discounts given in the firm's discretion as a courtesy or accommodation. I am informed and
16 believe that the bills for his work were reasonable and competitive or below market rate for
17 paralegals of comparable skill and experience in the San Francisco Bay Area. Mr. Khalil was the
18 lead paralegal at trial in this matter, coordinating witness schedules, trial exhibits, managing
19 evidence, revising documents and filing with court as needed. He also assisted in pre-trial matters
20 such as preparation of exhibits.

21 28. David A. Villanueva was a paralegal at MSR. Mr. Villanueva no longer
22 works at this firm. Over the course of the litigation, as reflected by the bills Mr. Villanueva billed
23 approximately 14.0 hours for a total of \$2450.00 (effective rate of \$175.00 per hour). His
24 "effective rate" in this case was considerably less than the current hourly rate for paralegals with
25 his level of experience due in large part to client discounts given in the firm's discretion as a
26 courtesy or accommodation. I am informed and believe that the bills for his work were reasonable
27 and competitive or below market rate for paralegals of comparable skill and experience in the San
28 Francisco Bay Area. Mr. Villanueva assisted with trial preparation.

CB3A1W4156X183410.2

- 13 -

DEC'L OF ARTHUR F. COON VS/Q MOTION FOR ATTORNEYS' FEES

01/22/2007 11:05 FAX 925 933 4126

MILLER STARR

015

1 29. Theodore E. Geier was a case clerk at MSR. Over the course of the
2 litigation, as reflected by the bills Mr. Geier billed approximately 35.4 hours for a total of \$885.00
3 (effective rate of \$25.00 per hour). The current rate for case clerks is \$25 per hour. I am informed
4 and believe that the bills for his work were reasonable and competitive or below market rate for
5 case clerks of comparable skill and experience in the San Francisco Bay Area. As case clerk, Mr.
6 Geier was responsible for organizing various documents, including pleadings, correspondence,
7 and client documents. This case required substantial case clerk attention. The voluminous files
8 occupy a whole office at MSR. The case involved, *inter alia*, approximately 38 volumes of
9 pleadings, 30 volumes of correspondence, 22 binders of deposition exhibits, 25 binders of trial
10 exhibits, 15 boxes of documents produced by District and third parties, a book case (from floor to
11 just below ceiling) full of documents related to depositions, and 16 boxes of related documents.

12 30. Terri L. Pangelina is a case clerk at MSR. Over the course of the litigation,
13 as reflected by the bills Ms. Pangelina billed approximately 21.4 hours for a total of \$265.00
14 (effective rate of \$12.38 per hour). The current rate for case clerks is \$25 per hour. Her "effective
15 rate" was considerably less than her current hourly rate due in large part to client discounts given
16 in the firm's discretion as a courtesy or accommodation. I am informed and believe that the bills
17 for her work were reasonable and competitive or below market rate for case clerks of comparable
18 skill and experience in the San Francisco Bay Area. As case clerk, Ms. Pangelina was responsible
19 for organizing various documents, pleadings, correspondence, etc.

20 31. Carol L. Davis was a case clerk at MSR. Ms. Davis no longer works at this
21 firm. Over the course of the litigation, as reflected by the bills Ms. Davis billed approximately
22 63.5 hours for a total of \$1587.50 (effective rate of \$25.00 per hour). I am informed and believe
23 that the bills for her work were reasonable and competitive or below market rate for case clerks of
24 comparable skill and experience in the San Francisco Bay Area. As case clerk, Ms. Davis was
25 responsible for organizing various documents, pleadings, correspondence, etc.

26 32. Ruth Beckett was a case clerk at MSR. Ms. Beckett no longer works at this
27 firm. Over the course of the litigation, as reflected by the bills Ms. Beckett billed approximately
28 166.7 hours for a total of \$4167.50 (effective rate of \$25.00 per hour). I am informed and believe

CRAAV44158683410.2

-14-

DECL. OF ARTHUR F. COON VS/O MOTION FOR ATTORNEYS' FEES

01/22/2007 11:06 FAX 925 933 4126

MILLER STARR

016

1 that the bills for her work were reasonable and competitive or below market rate for case clerks of
 2 comparable skill and experience in the San Francisco Bay Area. As case clerk, Ms. Beckett was
 3 responsible for organizing various documents, pleadings, correspondence, etc.

4 33. Stephen Z. Waterman is a case clerk recently hired at MSR. Over the
 5 course of the litigation, as reflected by the bills Mr. Waterman billed approximately 6.2 hours for a
 6 total of \$155.00 (effective rate of \$25.00 per hour). I am informed and believe that the bills for his
 7 work were reasonable and competitive or below market rate for case clerks of comparable skill
 8 and experience in the San Francisco Bay Area.

9 34. In addition to the attorneys, summer law clerks, paralegals, and case clerks
 10 who billed significant time to this case, as reflected by the bills a number of other attorneys,
 11 paralegals, and case clerks billed relatively minimal amounts of time on this case, totaling
 12 \$5,464.50. Their work on this matter is reflected in time entries included in the bills. (See Group
 13 Exhibit C). I am informed and believe that the bills for their work were reasonable and
 14 competitive or below market rate for legal professionals of comparable skill and experience in the
 15 San Francisco Bay Area.

16 35. For all attorney, paralegal, summer associate time spent on this case, this
 17 firm billed a total of approximately \$1,778,468.00 in fees as of December 31, 2006, which
 18 Plaintiffs are entitled to recover because of their prevailing party status.

19 36. As the bills demonstrate, as the billing attorney I often obtained MSR
 20 permission to write off or reduce fees and/or costs in this case. MSR often wrote off or reduced
 21 the time charged traveling to and/or from San Luis Obispo (a trip that took approximately three
 22 and one-half hours each way) as a courtesy or accommodation to the client. Mr. Speir and I did
 23 not charge the client at all for some client communications. These write offs and reductions were
 24 often made to attempt to reduce the severe strain on our clients' finances that resulted from
 25 District's dilatory and bad faith tactics, which drove up the cost of litigation substantially. I also
 26 wrote off or reduced charges for time in some cases if I felt work may have been duplicative or not
 27 as efficient as would be ideal, e.g., where a project took longer than expected. This motion seeks
 28 to recover only the reduced fees and/or costs actually billed to the client, not the fees and/or costs

CRAA44158062410.2

-15-

DECL. OF ARTHUR F. COON IN/S/O MOTION FOR ATTORNEYS' FEES

01-22/2007 11:06 FAX 925 933 4126

MILLER STARR

017

1 that would have been incurred at standard rates.

2 37. The billing statements in Group Exhibit C also include charges for legal
 3 research conducted on Westlaw. As reflected by the bills, the total amount billed to Plaintiffs for
 4 Westlaw research in this case was approximately \$53,215.86 as of December 31, 2006. The use of
 5 Westlaw was both reasonable and necessary in this case. Today, Westlaw (and comparable
 6 computer legal research web sites) is often the most efficient vehicle for legal research. This case
 7 raised several complex and/or novel issues that required the use of Westlaw, including, for
 8 example, issues raised by District's motion for summary adjudication, motions in limine, and
 9 equitable briefing, relating to standing, statute of limitations, damages, specific performance, the
 10 privileged nature of tax returns, and the public entity claim, as well as issues related to the
 11 recovery of fees and costs. As the bills demonstrate, I often reduced Westlaw charges in months
 12 where there was an exceptional need for computerized legal research, often a result of District's
 13 litigation tactics and arguments. This motion seeks recovery of only the reduced charges actually
 14 billed to the Cohens.

15 38. As provided in the fee agreement, MSR customarily bills its clients for the
 16 time spent conducting research on Westlaw because Westlaw is an expense to the firm not
 17 included in the overhead component of the attorneys' hourly rates.

18 39. Attached hereto as Group Exhibit "E" are true and correct copies of expert
 19 and consultant/witness billing statements received for services provided in this litigation.
 20 Together, as reflected by the documents, Bradley Baxter, Gary Rogers, Ted Mitchell, David
 21 Myerson, and Don Winter charged a total of approximately \$172,366.74 in fees and expenses.
 22 These charges are reasonable given their expertise, and qualifications, with which the Court is
 23 familiar from the trial record, and documents in its own files and under the circumstances of this
 24 case.

25 40. As provided in the fee agreement, MSR customarily bills its clients for the
 26 fees of expert consultants/witnesses it retains, and such fees are therefore an expense to the firm
 27 not included in the overhead component of the attorneys' hourly rates.

28 41. The billing statements also include charges for other litigation expenses,

CRAA441584083410.2

-16-

DECL. OF ARTHUR F. COON IN/O MOTION FOR ATTORNEYS' FEES

01/22/2007 11:08 FAX 925 933 4126

MILLER STARR

018

1 including, photocopying, faxing, postage, word processing, delivery charges, research fees, and
 2 supplies. The firm billed a total of approximately \$101,470.79 in such litigation costs. (This
 3 figure does not include the \$53,215.86 billed for Westlaw research and the \$172,366.74 billed for
 4 experts. This figure also excludes all litigation expenses claimed on Plaintiffs' Amended
 5 Memorandum of Costs filed on November 7, 2006.) MSR ordinarily bills its clients for each of
 6 the litigation expenses claimed in this paragraph because the expenses are not included in the
 7 overhead component of the attorneys' hourly rates.

8 42. For all litigation expenses spent on this case and billed to the client, which
 9 were not included in Plaintiffs' Amended Memorandum of Costs filed November 7, 2006,
 10 Plaintiffs incurred a total of approximately \$327,053.39 in costs as of December 31, 2006, which
 11 Plaintiffs are entitled to recover because of their prevailing party status.

12 43. The aforementioned fees are calculated as of December 31, 2006. Since
 13 that date, MSR has billed approximately \$41,000.00 (and counting) in additional fees for, among
 14 other things, preparation of this motion and Opposition to District's Motion to Tax. Plaintiffs
 15 anticipate filing a Reply to District's Opposition to Plaintiffs' Motion to Strike, Reply to District's
 16 Opposition to Plaintiffs' Motion to Tax, Opposition to District's Motion for Attorneys' Fees,
 17 Opposition to District's Opposition to Plaintiffs' Motion for Attorneys' Fees, and Reply to District's
 18 Reply to District's Opposition to Plaintiffs' Motion for Attorneys' Fees, all of which will require approximately
 19 Opposition to Plaintiffs' Motion for Prejudgment Interest, all of which will require approximately
 20 45 hours of additional work at a billing rate ranging from \$225 to \$500 per hour (or, an average
 21 rate of \$362/hour), for a total of approximately \$16,312.00. I anticipate I will also have to prepare
 22 for, travel to, and attend two hearings, which will require approximately 24 hours of additional
 23 work, at a billing rate of \$475 per hour, for a total of approximately \$11,400.00. Thus, in addition
 24 to the fees set forth in the statements attached as Group Exhibit C, Plaintiffs conservatively
 25 estimate they will incur approximately \$68,712.00, which they claim in their fee motion.
 26 Plaintiffs reserve the right to claim the actual amounts once they can be ascertained.

27 44. As the preceding paragraphs demonstrate, Plaintiffs, as prevailing parties
 28 under the contracts, Code of Civil Procedure section 1021 and Civil Code section 1717, should be
 awarded \$1,847,180.00 in attorneys' fees and \$327,053.39 in litigation expenses, to compensate

CRAA41586834102

-1-

DECL. OF ARTHUR F. COON IN/S/O MOTION FOR ATTORNEYS' FEES

01/22/2007 11:06 FAX 925 933 4126

MILLER STARR

019

1 for the fees and expenses already incurred and yet to be incurred in this action to enforce their
2 rights under the settlement agreement.

3 I declare under penalty of perjury under the laws of the State of California that the
4 foregoing is true and correct. Executed this 22nd day of January, 2007, at Walnut Creek,
5 California.



ARTHUR F. COON

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

CRAA44138683410.2

-18-

DECL. OF ARTHUR F. COON VS/O MOTION FOR ATTORNEYS' FEES

01/22/2007 11:06 FAX 925 933 4126

MILLER STARR

020

PROOF OF SERVICE(Barry A. Cohen, et al. v. Port San Luis Harbor District
San Luis Obispo Superior Court, Case No. CV 040897)

1 I, Karen Irias, declare:

2
3
4 I am a resident of the State of California and over the age of eighteen years, and not
5 a party to the within action; my business address is 1331 N. California Blvd., Fifth Floor, Post
6 Office Box 8177, Walnut Creek, CA 94596. On January 22, 2007, I served the within
7 documents:8 DECLARATION OF ARTHUR F. COON IN SUPPORT OF PLAINTIFFS'
9 MOTION FOR ATTORNEYS' FEES10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- by transmitting via electronic e-mail, to the following e-mail addresses indicated below on this date before 5:00 p.m.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Walnut Creek, California addressed as set forth below.
- by placing the document(s) listed above in a sealed _____ envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a _____ agent for delivery.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

Martin P. Moroski
 Adamski, Moroski, Madden & Green
 P. O. Box 3835
 San Luis Obispo, CA 93403-3835
 Tel: (805) 543-0990
 Fax: (805) 543-0980
 e-mail:
moroski@adamskimoroski.com

Overnight/Hand Delivery Only:
 6633 Bay Laurel Place
 Avila Beach, CA 93424

Attorneys for Defendant and Cross-
 Complainant PORT SAN LUIS
 HARBOR DISTRICT

David M. Cumberland
 Cumberland, Coates & Duenow, LLP
 550 Dana Street
 San Luis Obispo, CA 93401-3429
 Tel: (805) 541-4200
 Fax: (805) 541-4293
 e-mail: dmc@ccdlawfirm.com

Co-Counsel for Defendant and Cross-
 Complainant PORT SAN LUIS
 HARBOR DISTRICT

01/22/2007 11:08 FAX 925 933 4126

MILLER STARR

0021

1 Courtesy Copy:2 Hon. Barry T. LaBarbera
3 San Luis Obispo Superior Court
4 Department 2
5 1035 Palm St., 3rd Fl.
6 San Luis Obispo, CA 93408
7 e-mail:
8 Barry.LaBarbera@slo.courts.ca.gov9 I am readily familiar with the firm's practice of collection and processing
10 correspondence for mailing. Under that practice it would be deposited with the U.S. Postal
11 Service on that same day with postage thereon fully prepaid in the ordinary course of business. I
12 am aware that on motion of the party served, service is presumed invalid if postal cancellation date
13 or postage meter date is more than one day after date of deposit for mailing in affidavit.14 I declare under penalty of perjury under the laws of the State of California that the
15 foregoing is true and correct.

16 Executed on January 22, 2007, at Walnut Creek, California.

17

18

19

20

21

22

23

24

25

26

27

28



Karen Irias

CRAA\44158\683410.2

-20-

DECL. OF ARTHUR F. COON US/O MOTION FOR ATTORNEYS' FEES

01/22/2007 11:13 FAX 925 933 4126 MILLER STARR

029

1 GEORGE B. SPEIR (Bar No. 78276)
 2 ARTHUR F. COON (Bar No. 124206)
 3 CAROLYN E. NELSON (Bar No. 238526)
 4 MILLER, STARR & REGALIA
 5 A Professional Law Corporation
 6 1331 N. California Blvd., Fifth Floor
 7 Post Office Box 8177
 8 Walnut Creek, California 94596
 9 Telephone: (925) 935-9400

10 Attorneys for Plaintiffs
 11 BARRY A. COHEN, LEONARD A. COHEN,
 12 OLDE PORT INN, INC., and OLDE PORT
 13 FISHERIES, INC.

FILED

JAN 22 2007

SAN LUIS OBISPO SUPERIOR COURT
 BY Nancy G. Guidino
 N. Guidino, Deputy Clerk

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 15 COUNTY OF SAN LUIS OBISPO

16 BARRY A. COHEN; LEONARD A.
 17 COHEN; OLDE PORT INN, INC.; and
 18 OLDE PORT FISHERIES, INC.,

19 Plaintiffs,
 20 v.
 21 PORT SAN LUIS HARBOR DISTRICT;
 22 and DOES 1 to 50, inclusive,
 23 Defendants.

Case No. CV 040897

DECLARATION OF RICHARD CARSEL IN
SUPPORT OF PLAINTIFFS' MOTION FOR
ATTORNEYS' FEES

Date: February 21, 2007
 Time: 9:00 a.m.
 Judge: Hon. Barry T. LaBarbera
 Location: 801 Grand Avenue
 San Luis Obispo, CA

AND RELATED CROSS-ACTION.

I, Richard A. Carsel, hereby declare that I make this declaration based upon my personal knowledge, that I am competent to testify as to all matters stated herein, and if I were called and sworn as a witness I would testify as follows:

1. I am now and at all times relevant have been a duly licensed California attorney. I maintain my law practice in San Luis Obispo, California, and am a partner in the firm of Carsel & Attala, LLP.

01/22/2007 11:13 FAX 925 933 4126

JAN-19-2007 11:19

MILLER STARR

CARSEL & ATTALA, LLP

805 544 6357

030
F.03/06

1 2. I have been the general counsel for Olde Port Inn, Inc. and Olde Port
 2 Fisheries, Inc., and personal attorney for Barry A. Cohen and Leonard A. Cohen and
 3 their family businesses for many years (perhaps 20 or more). I have been directly or
 4 indirectly involved in numerous disputes between one or both of those corporations
 5 or businesses and one or both of the Cohens on the one hand, and the Port San Luis
 6 Harbor District ("District") on the other hand for perhaps the past 15 years.

7 3. For at least the past ten (10) years (and perhaps longer) there has been a
 8 major problem with respect to the condition of the Harford Pier, on which the Olde
 9 Port Inn restaurant and fish business is located. All of my efforts, and those of the
 10 Cohens, to resolve those matters informally by discussion and negotiation with the
 11 District ended in failure. The result was that the condition of the pier simply worsened.

12 4. For reference, I have practiced real estate law since 1973. I taught real
 13 estate law courses in the Business Department at Cal Poly for many years as an
 14 Assistant Professor of Business Administration. I was also counsel to the San Luis
 15 Obispo County Planning Commission and Board of Supervisors on real estate law
 16 matters when I was employed as a Deputy District Attorney for the County in the
 17 early 1970s (prior to the formation of the County Counsel's Office).

18 5. At one point, perhaps 15 or more years ago, Barry Cohen contacted me to
 19 advise that the District was threatening to unlawfully destroy the historic Hanford Pier
 20 canopy, as well as the Olde Port Inn restaurant. Barry Cohen believed that the
 21 threatened action violated his lease with the District dated January 1, 1976, as well
 22 as the California Environmental Quality Act ("CEQA") (Public Resources Code, §§
 23 21000, et seq.).

24 6. I met extensively with Barry Cohen, discussed the problem at length, and
 25 conducted my own research to determine what his options were and whether or not
 26 a lawsuit against the District to preserve the Pier was meritorious. I decided that the
 27 case had merit, but would require a specialized firm with unique experience and
 28 qualifications in CEQA litigation. In addition, I knew from experience that the District

Cohen, et. al. v. Port San Luis Harbor District
Case No. cv 0408987DECLARATION OF RICHARD A. CARSEL IN SUPPORT
OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES

01/22/2007 11:14 FAX 925 933 4126
 JAN-15-2007 11:20

MILLER STARR
 CARSEL & ATTALA, LLP

805 544 6357 P.04/06
 031

1 would mount a vigorous defense, that it would be very expensive to prosecute the
 2 litigation, and that whatever firm undertook the representation of the plaintiffs would
 3 have to be large enough to be able to devote several attorneys to the prosecution of
 4 the case. At that time, other than the Sinsheimer law firm which represented the
 5 District, in my opinion there were no attorneys or firms in the local San Luis Obispo
 6 area equipped with the necessary specialized skills, expertise and depth to handle
 7 Barry Cohen's case. Accordingly, I recommended Barry Cohen to the law firm of
 8 Miller, Starr & Regalia ("MSR") in Walnut Creek, California.

9 7. I knew that MSR was a real estate law firm, and that several of its attorneys
 10 had special knowledge and experience with CEQA cases. I have known of MSR for
 11 over forty-five (45) years (since the early 1960s), as Marvin Starr, a name partner,
 12 was my mother's friend and personal attorney; he counseled me as a college student
 13 preparing to go to law school. I had great personal respect for Mr. Starr, which later
 14 grew into professional respect as well when I became an attorney and practiced real
 15 estate law. For at least the last thirty (30) years of my practice I have relied upon The
 16 Current Law of California Real Estate, written by Miller & Starr, as the Bible for all
 17 questions dealing with real estate law. In short, I believed then and now that MSR
 18 was one of the best, if not the best, real estate law firms in California. I also believed
 19 it would take a firm of that quality to successfully represent the plaintiffs against the
 20 District.

21 8. At the time I referred Barry Cohen to MSR I was aware of their rate
 22 structure. I am informed and believe that the firm's rates were reasonable or
 23 competitive or below market rate for attorneys of comparable skill and expertise in the
 24 San Francisco Bay Area or the Los Angeles area. I discussed MSR's rates with both
 25 Barry and Leonard Cohen at that time, prior to their engagement of MSR. We also
 26 discussed using a larger firm from Santa Barbara and/or Ventura County. In the end,
 27 it was decided that the quality of representation we expected from MSR (based on
 28 their expertise) justified the higher rate (than would have been paid to a San Luis

Cohen, et. al. v. Port San Luis Harbor District
 Case No. CV 0408907

DECLARATION OF RICHARD A. CARSEL IN SUPPORT
 OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES

01/22/2007 11:14 FAX 925 933 4126

MILLER STARR
CARSEL & ATTALA, LLP

805 544 6357

032
1.05/65

JAN-19-2007 11:22

1 Obispo County firm, had there been one that was capable of handling this litigation).

2 9. I am informed and believe that after obtaining an injunction in Barry Cohen's
3 favor, (a) MSR negotiated a settlement with District which resolved the case, but (b)
4 District has since breached its obligations under the settlement agreement, leading
5 to the litigation currently before this Court.

6 10. In approximately 2004, when the dispute with the District flared up again
7 and it was clear that it was not resolved, I was again contacted by Barry and Leonard
8 Cohen to discuss the situation and evaluate their options. After those discussions, I
9 again recommended that they call MSR as they were completely familiar with the
10 case, would not require any time to "get up to speed", and were most capable of
11 protecting the interests of the plaintiffs.

12 11. I have recently discussed MSR's current rate structure with Leonard Cohen
13 and I understand it to be approximately as follows: \$600/hr for lead trial counsel.
14 \$395-475 for lead management counsel, \$190-275 for mid-level associates, \$321-
15 350 for senior associates and \$185-225 for relatively new associates. I have
16 personal knowledge as to the hourly fees currently charged by the larger and better
17 law firms in the San Luis Obispo area and in many cases the senior partners are
18 billing at \$400/hr or more.

19 12. It is still my opinion that MSR was the best firm to handle the case for
20 plaintiffs in 2004 because of their expertise, familiarity with the case and the ability
21 to handle litigation of this nature and magnitude. Assuming, *arguendo*, that the
22 plaintiffs had been able to retain a local firm in 2004 that could have provided the
23 same level of services which MSR provided - which, in my opinion, would not have
24 been possible - it does not appear to me that there would have been a cost savings
25 on the fees incurred by the plaintiffs (because the new firm would have had to incur
26 substantial fees and expenses to "get up to speed", etc.). Based on my experience,

27 //

28 //

Cohen, et. al. v. Port San Luis Harbor District
Case No. CV 0408987

DECLARATION OF RICHARD A. CARSEL IN SUPPORT
OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES

01/22/2007 11:14 FAX 925 933 4126

MILLER STARR

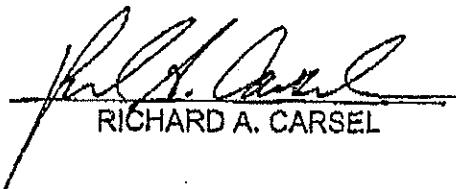
805 544 6357 P.06/06

JAN-19-2007 11:23

CARSEL & ATTALA, LLP

1 given the nature of the litigation and the skill of the attorneys for the defendants, the
2 fees charged by MSR appear to me to be reasonable under the circumstances.

3 I declare under penalty of perjury under the laws of the State of California that
4 the foregoing is true and correct. Executed this 19th day of January, 2007, at San Luis
5 Obispo, California.


RICHARD A. CARSEL

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Cohen, et. al. v. Port San Luis Harbor District
Case No. CV 0408987

DECLARATION OF RICHARD A. CARSEL IN SUPPORT
OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES
TOTAL P.06

01/19/2007 FRI 11:16 [TX/RX NO 7868]

01/22/2007 11:14 FAX 925 933 4126

MILLER STARR

4034

PROOF OF SERVICE

PROOF OF SERVICE
(Barry A. Cohen, et al. v. Port San Luis Harbor District
San Luis Obispo Superior Court, Case No. CV 040897)

I, Karen Irias, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 1331 N. California Blvd., Fifth Floor, Post Office Box 8177, Walnut Creek, CA 94596. On January 22, 2007, I served the within documents:

DECLARATION OF RICHARD CARSEL IN SUPPORT OF PLAINTIFFS'
MOTION FOR ATTORNEYS' FEES

8 by transmitting via facsimile the document(s) listed above to the fax number(s) set
forth below on this date before 5:00 p.m.

9 by transmitting via electronic e-mail, to the following e-mail addresses indicated
below on this date before 5:00 p.m.

10 by placing the document(s) listed above in a sealed envelope with postage thereon
fully prepaid, in the United States mail at Walnut Creek, California addressed as
set forth below.

11 by placing the document(s) listed above in a sealed _____ envelope
12 and affixing a pre-paid air bill, and causing the envelope to be delivered to a
13 _____ agent for delivery.

14 by personally delivering the document(s) listed above to the person(s) at the
15 address(es) set forth below.

Martin P. Moroski
Adamski, Moroski, Madden & Green
P. O. Box 3835
San Luis Obispo, CA 93403-3835
Tel: (805) 543-0990
Fax: (805) 543-0980
e-mail:
moroski@adamskimoroski.com

David M. Cumberland
Cumberland, Coates & Duenow, LLP
550 Dana Street
San Luis Obispo, CA 93401-3429
Tel: (805) 541-4200
Fax: (805) 541-4293
e-mail: dmcc@ccdlawfirm.com

Overnight/Hand Delivery Only:
6633 Bay Laurel Place
Avila Beach, CA 93424

Co-Counsel for Defendant and Cross-
Complainant PORT SAN LUIS
HARBOR DISTRICT

Attorneys for Defendant and Cross-
Complainant PORT SAN LUIS
HARBOR DISTRICT

Attorneys for Defendant and Cross-
Complainant PORT SAN LUIS
HARBOR DISTRICT

DECL. OF RICHARD CARSEL IN/O MOTION FOR ATTORNEYS' FEES

01/22/2007 11:14 FAX 925 933 4126 MILLER STARR

4035

1 Courtesy Copy:

2 Hon. Barry T. LaBarbera
3 San Luis Obispo Superior Court
4 Department 2
5 1035 Palm St., 3rd Fl.
San Luis Obispo, CA 93408
e-mail:
Barry.LaBarbera@slo.courts.ca.gov

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

9 I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 22, 2007, at Walnut Creek, California.

Karen Iriás

DECL. OF RICHARD CARSEL I/S/O MOTION FOR ATTORNEYS' FEES

01/22/2007 11:15 FAX 925 933 4128 MILLER STARR

038

1 GEORGE B. SPEIR (Bar No. 78276)
2 ARTHUR F. COON (Bar No. 124206)
3 GAVIN D. WHITIS (Bar No. 184133)
4 CAROLYN NELSON ROWAN (Bar No. 238526)
5 MILLER, STARR & REGALIA
6 A Professional Law Corporation
1331 N. California Blvd., Fifth Floor
Post Office Box 8177
Walnut Creek, California 94596
Telephone: (925) 935-9400
Facsimile: (925) 933-4126

7 Attorneys for Plaintiffs
8 BARRY A. COHEN, LEONARD A. COHEN,
OLDE PORT INN, INC., and OLDE PORT
FISHERIES, INC.

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SAN LUIS OBISPO

13 BARRY A. COHEN; LEONARD A.
14 COHEN; OLDE PORT INN, INC.; and
OLDE PORT FISHERIES, INC..

Case No. CV 040897

PLAINTIFFS' REQUEST FOR JUDICIAL
NOTICE IN SUPPORT OF MOTION FOR
ATTORNEYS' FEES AND LITIGATION
EXPENSES AND COSTS

15 Plaintiffs,

16 v

17 PORT SAN LUIS HARBOR DISTRICT
and DOES 1 to 50, inclusive.

[Cal. Evid. Code §§ 452(d), 453]

Date: February 21, 2007

Time: 9:00 a.m.

Judge: Hon. Barry T. La Barbera
Location: 801 Grand Avenue
San Luis Obispo, CA

AND RELATED CROSS-ACTION.

22 | P a g e | REQUEST FOR JUDICIAL NOTICE

23 Plaintiff's Barry Cohen, Leonard Cohen, Olde Port Fisheries, Inc. ("OPF"), and
24 Olde Port Inn, Inc. ("OPI") (the "Cohens" or "Plaintiffs") respectfully request that, pursuant to
25 Evidence Code sections 452(d) and 453, and all applicable law, the Court take judicial notice of
26 its own records and files in the above-captioned matter, including, but not limited to, all
27 pleadings, briefs, declarations, exhibits, correspondence, e-mails, documents, evidence, orders,

CRAA\44158\687771.1

2

PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE i/s/o MOTION FOR ATTORNEYS' FEES

01/22/2007 11:15 FAX 925 933 4126 MILLER STARR

037

1 trial transcripts, and depositions lodged with the Court, and any other papers, documents and
 2 things in the Court's file in this matter.

3 This Request for Judicial Notice is submitted with Plaintiffs' Notice of Motion and
 4 Motion for Attorneys' Fees and its supporting Memorandum of Points and Authorities, the
 5 Declarations of Arthur F. Coon, Barry A. Cohen, Leonard A. Cohen, and Richard Carsel, and all
 6 supporting papers.

7 **II. MEMORANDUM OF POINTS AND AUTHORITIES**

8 Judicial notice may be taken of records of any court of this state. (Evid. Code,
 9 § 452(d)(1).) When a party requests that a trial court take judicial notice of court records, the
 10 court must take judicial notice if the party requesting judicial notice gives each adverse party
 11 sufficient notice of the request to enable the party to prepare to meet the request, and furnishes the
 12 court with sufficient information to enable it to take judicial notice of the matter. (Evid. Code.
 13 § 453.)

14 This Court can and should take judicial notice of its own records and files in the
 15 above-captioned matter, as requested above, as the Cohens hereby make a proper application and
 16 provide adequate notice as set forth in Evidence Code section 453. (See Evidence Code, §§
 17 452(d), 453.) The Court has sufficient information to enable it to take judicial notice of the
 18 matter, since the files that are the subject of this request are in the Court's control and possession.

19 Accordingly, the Court should take judicial notice of its own files, records and
 20 documents as requested.

21 Respectfully submitted,

22 Dated: January 22, 2007

23 MILLER, STARR & REGALIA

24 By:

25 
ARTHUR F. COON

26 Attorneys for Plaintiffs BARRY A.
 27 COHEN, LEONARD A. COHEN, OLDE
 28 PORT INN, INC., and OLDE PORT
 FISHERIES, INC.

01-22/2007 11:13 FAX 925 833 4126

MILLER STARR

038

PROOF OF SERVICE

(*Barry A. Cohen, et al. v. Port San Luis Harbor District*
 San Luis Obispo Superior Court, Case No. CV 040897)

I, Karen Irias, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 1331 N. California Blvd., Fifth Floor, Post Office Box 8177, Walnut Creek, CA 94596. On January 22, 2007, I served the within documents:

**PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF
 PLAINTIFFS' MOTION FOR ATTORNEYS' FEES**

- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- by transmitting via electronic e-mail, to the following e-mail addresses indicated below on this date before 5:00 p.m.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Walnut Creek, California addressed as set forth below.
- by placing the document(s) listed above in a sealed _____ envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a _____ agent for delivery.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

Martin P. Moroski
 Adamski, Moroski, Madden & Green
 P. O. Box 3835
 San Luis Obispo, CA 93403-3835
 Tel: (805) 543-0990
 Fax: (805) 543-0980
 e-mail:
moroski@adamskimoroski.com

Overnight/Hand Delivery Only:
 6633 Bay Laurel Place
 Avila Beach, CA 93424

Attorneys for Defendant and Cross-
 Complainant PORT SAN LUIS
 HARBOR DISTRICT

David M. Cumberland
 Cumberland, Coates & Duenow, LLP
 550 Dana Street
 San Luis Obispo, CA 93401-3429
 Tel: (805) 541-4200
 Fax: (805) 541-4293
 e-mail: dmc@ccdlawfirm.com

Co-Counsel for Defendant and Cross-
 Complainant PORT SAN LUIS
 HARBOR DISTRICT

CRAA441581687771.1

-3-

PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF ATTORNEYS' FEES

01/22/2007 11:15 FAX 925 933 4128

MILLER STARR

039

1

Courtesy Copy:

2

Hon. Barry T. LaBarbera
San Luis Obispo Superior Court
Department 2
1035 Palm St., 3rd Fl.
San Luis Obispo, CA 93408
e-mail:
Barry.LaBarbera@slo.courts.ca.gov

6

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

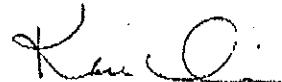
9

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

10

Executed on January 22, 2007, at Walnut Creek, California.

11



Karen Irias

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

CRAA44156687771.1

-4-

01/22/2007 11:11 FAX 825 933 4126 MILLER STARR

014

1 GEORGE B. SPEIR (Bar No. 78276)
 2 ARTHUR F. COON (Bar No. 124206)
 3 CAROLYN E. NELSON (Bar No. 238526)
 4 MILLER, STARR & REGALIA
 5 A Professional Law Corporation
 6 1331 N. California Blvd., Fifth Floor
 7 Post Office Box 8177
 8 Walnut Creek, California 94596
 9 Telephone: (925) 935-9400

FILED

JAN 22 2007

SAN LUIS OBISPO SUPERIOR COURT
BY *Name G. Gudino*
N. Gudino, Deputy Clerk

10 6 Attorneys for Plaintiffs
 11 7 BARRY A. COHEN, LEONARD A. COHEN,
 12 8 OLDE PORT INN, INC., and OLDE PORT
 13 9 FISHERIES, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN LUIS OBISPO

14 11 BARRY A. COHEN; LEONARD A.
 15 12 COHEN; OLDE PORT INN, INC.; and
 16 13 OLDE PORT FISHERIES, INC.

Case No. CV 040897

DECLARATION OF BARRY COHEN IN
SUPPORT OF PLAINTIFFS' MOTION FOR
ATTORNEYS' FEES

17 14 Plaintiffs,
 18 15 v.
 19 16 PORT SAN LUIS HARBOR THE
 20 17 DISTRICT; and DOES 1 to 50, inclusive.
 21 18 Defendants.

Date: February 21, 2007

Time: 9:00 a.m.

Judge: Hon. Barry T. LaBarbera

Location: 801 Grand Avenue
San Luis Obispo, CA

Complaint Filed: October 22, 2004

Trial Date: May 8, 2006

AND RELATED CROSS-ACTION.

I, Barry Cohen, declare:

1. I am an individual currently residing in Aptos, Santa Cruz County,
 2 California. I am a plaintiff in this lawsuit and an owner of plaintiff Olde Port Fisheries, Inc.
 3 ("OPF"). The facts stated in this declaration are true as of my own personal knowledge, and if
 4 called as a witness I could and would testify competently to those facts.

2. I am a fisherman and have been for most of my adult life. I built the Olde
 3 Port Inn restaurant and OPF facilities on the Harford Pier (the "Pier") starting in approximately

CRAA441581683417.3

-1-

DECL. OF BARRY COHEN IN SUPPORT OF MOTION FOR ATTORNEYS' FEES

01/22/2007 11:11 FAX 925 933 4126 MILLER STARR

015

1 1964, I had operated a wholesale/processing fish busi . on the Pier for over 40 years, until the
 2 actions of Defendant Port San Luis Harbor District ("the District") in mid-to-late 2004
 3 drastically and fatally prevented me from operating my business on the Pier. Without the
 4 necessary, reasonable truck access, I was virtually "kicked off the Pier." These actions of the
 5 District, among others, breached the settlement and lease agreements I made over ten years ago
 6 with the District and resulted in the filing of this lawsuit.

7 3. The District has been found by the jury and the Court to have breached
 8 several contracts it has with me and the other plaintiffs. The 1994 Lease that the District
 9 breached was required by and incorporates the 1993 Settlement Agreement. The 1993
 10 Settlement Agreement and 1994 Lease embody the settlement of my previous lawsuit against the
 11 District in the early-1990s. That lawsuit concerned the District's plan to demolish the historic
 12 warehouse canopy on the terminus of the Pier. This historic structure serves as the supporting
 13 structure for the OPI restaurant and OPF buildings, as well as the restaurant roof.

14 4. I hired the law firm of Miller Starr Regalia ("MSR") to represent me in
 15 that lawsuit. Before hiring MSR, I sought the advice of my local counsel. Richard Carsel, my
 16 attorney in the San Luis Obispo area, informed me that I would need an attorney with special
 17 experience with CEQA issues. He suggested MSR, which then had offices in Oakland and
 18 Walnut Creek, California. Following Mr. Carsel's recommendation, I met with George Speir
 19 and Arthur F. Coon of MSR, and I hired MSR because they seemed most qualified to handle my
 20 case and there were no comparable alternative firms in the San Luis Obispo area that I knew of
 21 to handle issues of this nature, complexity and importance.

22 5. MSR instituted litigation on my behalf in which I was successful in
 23 obtaining a preliminary injunction against the District's threatened unlawful demolition of the
 24 canopy. After substantial additional litigation, but before trial and as an alternative to continuing
 25 that lawsuit, the District and I made an agreement that I would dismiss the lawsuit in return for
 26 the District's agreement to, among other things, the following material conditions:

27 a. The District would not demolish the canopy;

CRAA441581683417.3

-2-

DECL. OF BARRY COHEN IN SUPPORT OF MOTION FOR ATTORNEYS' FEES

91/22/2007 11:11 FAX 925 933 4126

MILLER STARR

2018

10 6. In return for a dismissal of the lawsuit, the District agreed to these
11 conditions and we memorialized them in the 1993 Settlement Agreement, and later the 1994
12 Lease. Accordingly, I dismissed the lawsuit. However, the District has now breached the
13 material terms and conditions of our settlement contained in both the 1993 Settlement
14 Agreement and the 1994 Lease.

15 7. I fulfilled my obligation to the District by dismissing the lawsuit in 1993.
16 On the other hand the District, after receiving the benefits of this dismissal, chose not to fulfill its
17 obligation to honor the terms and conditions of our underlying settlement agreement, namely, the
18 terms and conditions of the 1993 Settlement Agreement and the 1994 Lease.

19 8. As a result of my initial lawsuit against the District, I first considered the
20 issue of an attorneys' fees clause because the 1976 Lease did not have one. I had to pay my
21 attorneys' fees out-of-pocket even though I did nothing to bring about the circumstances giving
22 rise to the District's illegal decision to demolish the canopy. I decided I had to protect myself in
23 the event that the District might again take unlawful action and/or breach some aspect of the
24 1976 Lease and/or the settlement agreement. An attorneys' fees clause, I hoped and believed,
25 would act as a deterrent and afford me some protection. If the District still persisted and
26 deprived me of my legal rights, and if I prevailed in a legal and/or equitable action, then the
27 District would be held accountable and responsible to pay my expenses, costs and attorneys'

CRAA4415816834173

-1

DECL. OF BARRY COHEN IN SUPPORT OF MOTION FOR ATTORNEYS' FEES

01/22/2007 11:11 FAX 925 933 4126 MILLER STARR

017

1 fees. This is exactly what the District agreed to do on page 14 of the 1993 Settlement
2 Agreement, at paragraph 11 ("Attorneys' Fees")

3 If any litigation be commenced between the parties hereto concerning this
4 agreement or the rights and duties of either Cohen or The District hereunder,
5 whether it be an action for damages, equitable or declaratory relief, the prevailing
6 party in such litigation, in addition to such other relief as may be granted by the
7 court, shall be entitled to recover from the other party reasonable expenses,
8 attorneys' fees and costs.

9. The District agreed to have "Attorneys' Fees" clauses in the 1993
10 Settlement Agreement and the 1994 Lease, and to "tie" an attorneys' fees clause to the 1976
11 Lease. The "tie" for attorneys' fees to the 1976 Lease comes from the 1993 Settlement
12 Agreement, page 16, paragraph, 15 ("Good Faith"): "The parties acknowledge and agree that
13 each party hereto has an obligation of good faith and fair dealing, to conduct himself or itself in
14 such a fashion so as not to deprive any other party of the benefits to be derived from this
15 Agreement *or from the Lease.*" (italics added.) The "Lease" referred to was defined in the 1993
16 Settlement Agreement on page 1 in the recitals: "WHEREAS, Cohen and The District are
17 parties to a lease agreement dated January 1, 1976 ('Lease'), pursuant to which Cohen leases
18 certain property from the District." So a violation of the 1976 Lease is also a violation of the
19 "Good Faith" clause of the 1993 Settlement Agreement, which includes an attorneys' fees
20 clause.

21 10. Although over the years the District did not live up to all of its continuing
22 contract obligations, as shown by its lack of parking enforcement, allowance of exclusive RV
23 parking, failure to maintain the Pier, etc., I did not take any legal action against the District. I
24 complained to the District about its failures to uphold its end of the agreements, but I did not
25 want another legal battle with the District. A lawsuit would be my absolute last recourse.

26 11. When it became clear that the District's threat of breaches regarding
27 guaranteed truck access and parking were real and imminent, my son, Leonard, and I, again
28 following Richard Carsel's advice, retained MSR to try to resolve the dispute. We retained the
firm again because of its affiliation with the prior lawsuit, and its qualifications, capability, and
familiarity with the facts and issues. MSR was uniquely acquainted with the parties and

01/22/2007 11:11 FAX 925 833 4126 MILLER STARR

018

1 contracts at issue, as it had handled the prior litigation and participated in negotiating and
2 drafting the 1993 Settlement Agreement and 1994 Lease. No local firm shared this familiarity
3 with the issues, parties, documents and evidence, and we felt MSR was really our only wise
4 choice.

5 12. Unfortunately, at the June 2004 the District Commissioners' Meeting, the
6 District took action that I could not live with. The District reconfigured the parking areas on the
7 Pier terminus in such a manner as to deprive me of the settlement agreement's guaranteed
8 twenty, but in no event less than seventeen, public parking spaces. I was also deprived of the
9 reasonable fish truck access guaranteed by the 1994 Lease. Either way, at any given time, I
10 could only have one or the other, but not both.

11 13. At that meeting I pleaded with the District's Commissioners to reconsider.
12 I explained that the action the District was about to take would be in direct violation of our 1993
13 Settlement Agreement and our 1994 Lease. I reminded Commissioner Carolyn Moffat that she
14 was the Commissioner who signed the 1993 Settlement Agreement on behalf of the District. I
15 explained there were other viable options that would accomplish the same goals the District said
16 it wanted to achieve -- primarily an open 18-foot fire lane the length of the Pier -- without
17 violating the agreements the District had with me. Commissioner Moffat said she was sorry that
18 this would hurt our customers, and in turn hurt me, but she voted for the new parking
19 configuration anyway. All but one of the Commissioners voted in favor of the new
20 configuration, without even looking at the 1993 Settlement Agreement or the 1994 Lease, even
21 though copies of the agreements were available in the same building as the meeting. The
22 Commissioners apparently did not care enough about their obligations to even review the
23 agreements to confirm what their obligations were under those agreements, prior to voting on an
24 action that would clearly breach them.

25 14. Still, I wanted to avoid any legal action if at all possible. I had Arthur
26 Coon, our attorney from MSR, come to the next meeting of the Harbor The District Commission
27 to speak with the Commissioners in an effort to avoid any legal action. He explained in detail
28 how the District could comply with its contracts with the Cohens and its own Master Plan and
CRAA#44158#681417.3

01/22/2007 11:12 FAX 925 033 4126 MILLER STARR

010

1 Coastal Act obligations in a way that would be a "win-win." The Commissioners simply
 2 thanked Mr. Coon for his concerns and moved on to the next agenda item without further
 3 comment or acknowledgement. Nothing changed. Next, my son Leonard and I offered the
 4 District up to a \$20,000 loan to help cover the cost to use another parking/truck access option
 5 that both the District and I could live with. The District rejected the offer, which was formally
 6 made in a July 2, 2004, letter to the District. We tried to meet with CDF to explain and resolve
 7 the problem, but CDF, which is the District's designated fire protection agent, would only meet
 8 with the District. I tried very hard to find a compromise that would avoid litigation, but the
 9 District would not budge one inch off their position. It did not even try to honor its contracts.

10 15. Eventually, the District started placing "warning" tickets on "illegally"
 11 stopped vehicles (mostly the semi fish trucks). Finally, the District had the CDF Fire Marshall
 12 issue an actual citation to a semi fish truck. Once that happened, I had no choice but to seek
 13 legal redress. I notified Art Coon who filed a complaint. We attempted mediation with Judge
 14 Conklin, and CDF's Mike Harkness even attended a session at the Judge's request to see if a
 15 solution to the pier configuration problem could be reached, but the District would still not agree
 16 to honor its contract obligations.

17 16. The District put me in an impossible position that left me no choices or
 18 options. I did nothing to provoke this lawsuit and in fact made great efforts to avoid it. In spite
 19 of my repeated pleas, the leases, the settlement agreement, our attorney's public explanation to
 20 the Commissioners, and our monetary offer, the District knowingly chose to breach its
 21 settlement agreement. If I wanted to maintain and protect my bargained-for rights, then I was
 22 forced to seek this Court's assistance.

23 17. Since the District chose to deprive me of the full advantage of the leases
 24 and settlement agreement and drove my wholesale fish processing operation out of business, I
 25 stopped paying rent under the 1994 Lease and wanted to renegotiate a new "fair" rental value for
 26 the 1994 Lease. But the District chose, instead, to send me a 15-day "notice of eviction" to evict
 27 me for nonpayment of rent. I responded in good faith by tendering a \$6,000 adjusted rent check
 28 with an explanation that this was a good faith effort toward payment of a reasonably reduced

CRAAV415B683417.3

-6-

01/22/2007 11:12 FAX 925 933 4126

MILLER STARR

020

1 rent. If the District and I could not agree on what a "fair" rent should be, as required in the 1993
 2 Settlement Agreement, I felt that the only option was to make a good faith tender and let a court
 3 of law make the decision as to the fair amount for us given the District's material breaches of our
 4 Settlement Agreement.

5 18. The District rejected my good faith offer, returned the check and notified
 6 me that only the full rent amount would be acceptable. The District then sued me in a cross-
 7 complaint, asking for full rent and seeking to evict me for not paying such rent. My position,
 8 going into court, remained the same. I should pay whatever the judge or jury decided to be a fair
 9 reduced rent for the premises due to the District's breach of the leases and settlement agreement.
 10 For its part, the District went into court asking for full rent only, plus late fees and interest, and
 11 my eviction from the premises.

12 19. I am a prevailing party in this action because I received the "greater relief"
 13 on the contract claims. From the beginning of this dispute, when the District announced its
 14 intention to implement the interim shared-use plan, my main objective was to stop the District's
 15 breaches and force the District to comply with its settlement agreement obligations. To try to
 16 achieve this objective, my attorney drafted a public entity claim letter demanding that the
 17 District "do whatever needs to be done to comply with its legal obligations." When it became
 18 clear that the District would not comply with its obligations, my attorney filed a Complaint
 19 seeking to remedy the District's stubborn refusal to honor its agreements to provide the required
 20 public parking and truck access, and to adequately repair and maintain the Pier. Throughout the
 21 litigation, my primary concern remained the District's breaches of the contracts at issue, i.e., the
 22 settlement agreement. After more than 2 years of litigation during which the District refused to
 23 acknowledge its breaches or offer to perform, I finally achieved my goal of proving those
 24 breaches and compelling the District to comply with its obligations when the Court issued its
 25 Statement of Decision and entered Judgment granting me \$50,000 in past damages (as awarded
 26 by the jury) and significant equitable relief, and setting a fair reduced rent. The declaratory
 27 judgment and specific performance decree granted me substantially all redress I sought to
 28 achieve by this law suit.

CRAA4415896834173

-7-

DECL. OF BARRY COHEN IN SUPPORT OF MOTION FOR ATTORNEYS' FEES

01/22/2007 11:12 FAX 925 933 4126 MILLER STARR

021

1 20. In addition to achieving my primary litigation objectives, this relief far
 2 outweighs any relief granted to the District. From the outset, the District's contentions have
 3 been that it did breach the contracts and did not have to comply with what we contended were its
 4 obligations under the contracts. The District also made a claim against me for indemnity,
 5 ejection, and full back rent under the agreements. The Court's Judgment—which found that
 6 the District had and breached contract obligations to the plaintiffs, that the District must comply
 7 with those obligations, that I need not indemnify the District, that the District's claim for
 8 ejection was rejected, and that I owe only partial back rent because of the District's breaches—
 9 is therefore a complete failure for the District. It was not the District's primary litigation
 10 objective to be declared and found liable for breach of all the contracts, to pay my damages, to
 11 be forced to reduce my rent to half and allow me to remain in possession of the premises, and to
 12 be ordered to permit parking truck access, remove RVs from Harford landing and require the
 13 pier walkway as we had requested. While the Court ordered that I pay the District \$44,808.98 in
 14 back rent on the cross-complaint, *this actually represented a success for me on Defendant's*
 15 *breach of contract claim.* The new "fair" amount of "back rent due" awarded to the District was
 16 actually a net loss to the District of one-half of the original "fair" amount of "rent due" under the
 17 1994 Lease (before the District's breach). Therefore, the District suffered a net loss of rent
 18 income under the 1994 Lease by one-half of the rent otherwise due because of their breach of the
 19 1994 Lease. Moreover, the District will suffer further loss of rent income under the 1994 Lease
 20 by one-half until they comply with the 1993 Settlement Agreement and the 1994 Lease, which
 21 again, will be a monetary gain to me. The amount awarded by the Court to the District was less
 22 than my \$50,000 damages award, and less than half of what the District demanded and excludes
 23 late fees. Essentially, the Court found that I was substantially justified in not paying rent due to
 24 the District's material breaches, ruling in favor of my request for an adjusted "fair" rent and at
 25 the same time verifying that the District was in breach of the leases and settlement agreement
 26 and could not expect payment of full rent, just like I had said. At the outset, I had offered partial
 27 rent – which the District rejected, insisting on full rent – so this partial rent award is no victory at
 28 all for the District. When the District's minimal, partial relief, and failure to achieve its primary

CRAAM4138663417.3

-8-

01/22/2007 11:12 FAX 925 833 4126

MILLER STARR

022

1 litigation objectives, is compared with my substantial equitable and monetary awards, and
 2 achievement of our primary litigation objectives, it is clear that we obtained the greater relief in
 3 this action.

4 21. The District never made any sincere effort to reach an agreement with me
 5 or any of us to settle our dispute or this lawsuit. It is also a fact that the District, at its sole
 6 discretion, could have corrected and cured its breaches and fulfilled its obligations at any time,
 7 before the trial, during the trial and now. The District is the only one, between us, that has the
 8 authority and ability to make things right. However, the District has chosen not to do so.

9 22. I believe, and with good cause, that one of the District's strategies was to
 10 spend its insurance company's money to multiply and expand this litigation so as to force
 11 Leonard and I to expend all their personal resources until none were left and the District could
 12 win by default. Why else would such a basic decision-making process over parking, truck
 13 access and a fire lane be turned into a multi-million dollar lawsuit, especially when there were
 14 attorneys' fees clauses benefiting the prevailing party who obtained either damages or equitable
 15 relief? At this point, this lawsuit has cost me so much in time, money and personal hardship,
 16 that even if I were awarded all of the expenses, costs and attorneys' fees, it would still take me
 17 years, if ever, to be made whole. I have been forced to take out loans on and finally to put my
 18 house up for sale to finance this lawsuit in an effort to enforce the contracts with the District. I
 19 ask the Court to consider the overall fairness and justice of the outcome of the jury trial and the
 20 Court's rulings on plaintiffs' equitable claims. With their eyes wide open, the District
 21 knowingly and in bad faith has purposely deprived me, my son and our family businesses of the
 22 material benefits under their current agreements with me, which they promised me in 1993, if I
 23 would dismiss the lawsuit against them.

24 I find it ludicrous that the District would even think to ask this Court or me for
 25 anything other than forgiveness. Again, the District, with their eyes open, knowingly and in bad
 26 faith "broke" their word to me. They "breached" all our leases between us. They violated the
 27 1993 Settlement Agreement after they enjoyed a dismissal of the previous lawsuit. They deprived
 28 Leonard and I of our Lease rights. They have hurt and are still hurting our businesses and even

CRAA441584834173

-9-

DECL. OF BARRY COHEN IN SUPPORT OF MOTION FOR ATTORNEYS' FEES

01/22/2007 11:12 FAX 025 933 4126

MILLER STARR

023

1 "ran" the major commercial fishing activities (which is in violation of the California Coastal Act)
 2 out of the Harbor. They let the Pier deteriorate and fall into neglect. They knowingly allowed our
 3 customers to get hurt walking the Pier because of their neglect. They displaced our customer's
 4 parking spaces with RVs. They used "scorched earth" tactics during this lawsuit to drain all of our
 5 resources. They attacked Leonard and I personally. They invaded our privacy. They knowingly
 6 lied about me. They were found by the judge and jury to have "breached" our leases and
 7 Settlement Agreement, yet they continue on. Threatening me with an appeal of this Court's
 8 decision, I know now without a doubt their motives and actions. They feel no remorse for acting
 9 like a bully throughout this litigation, forcing us to trial, forcing us to establish liability and
 10 breaches, but still failing to comply with this Court's order. Even today, they still have not made
 11 any effort to do the "right thing."

12 The District has acted in bad faith with me and now with this Court, also. In my
 13 opinion the District has not made a sincere effort to comply with this Court's orders. The District
 14 has tried again and again to mislead this Court. Today they stand in defiance of this Court's
 15 orders. The District seems to think they are above the law, but that is not how I understand
 16 the legal system to work. I have also personally watched and listened to them mislead and be less
 17 than truthful to the Coastal Commission.

18 It is incredible that they have the temerity to come into this Court, claiming to be
 19 the prevailing party. They are also asking this same Court, that they defy, to order Leonard and I
 20 to pay their costs and their attorneys' fees, even though they acted in such bad faith and caused
 21 such harm. Have these people absolutely no conscience at all? Here are the facts: These are the
 22 people that promised in 1993 to pay our reasonable expenses, attorneys' fees, and costs if
 23 they acted in such a fashion as to deprive us of the benefits of our leases and settlement
 24 agreement. Well, here we are today and that's exactly what they did: "deprive us of the benefits
 25 of our leases and settlement agreement," with their eyes wide open. I am astonished that the
 26 District can stand before you and with a straight face say they deserve anything other than
 27 punishment for their behavior, acting as if they did nothing wrong, caught "red
 28 handed," and yet not be embarrassed for their defiance of this Court's orders, for their disregard of

CRAAM4415B683417.3

-10-

01/22/2007 11:13 FAX 925 933 4126

MILLER STARR

024

1 other's rights, and their total lack of good faith and fair dealing. The District badly hurt my son
2 and I, our families, and our businesses.

3 In my humble opinion, it would not be fair to my son and I if we were denied
4 an award of expenses, attorneys' fees, and costs. After all, that is what the District promised us in
5 1993. Denial of our total lawsuit expenses may actually cause me to be forced out of business
6 totally and into bankruptcy, only because I stood up for my clear legal rights when they were
7 being knowingly and intentionally violated by the District.

8 23. In summary:

9 a. The District made an agreement with me in 1993, from which they
10 have already enjoyed the benefits and are now depriving me of my benefits.

11 b. The District was found by the judge and the jury to have breached
12 our leases and settlement agreement.

13 c. The District agreed to an "Expenses, Attorneys' Fees, and Costs"
14 clause as part of our 1993 Settlement Agreement.

15 d. The District agreed to a "Good Faith" provision in our 1993
16 Settlement Agreement.

17 e. The District voted to hurt our businesses before even reviewing our
18 agreements.

19 f. We offered The District up to a \$20,000 loan to help fund a
20 mutually agreeable option.

21 g. The District made this lawsuit as expensive as they possibly could to
22 "clean us out," hoping to "win" by default.

23 (i) The District used insurance money to finance this litigation.
24 (ii) We used our money to enforce our rights and stand up to The
District's tactics.

25 h. The District has not complied with the judge's order.

26 i. The District did not use "good faith" and "fair dealings" in their
27 agreements with me.

01/22/2007 11:13 FAX 925 933 4126

MILLER STARR

5025

3 k. We did all we could to avoid this lawsuit, but the District was the
4 one that had the "power" to make things right. They chose not to avoid the lawsuit.

5 24. For all the reasons previously stated, and the Court's orders and the jury's
6 findings, I ask the Court to find me and the other plaintiffs to be the "prevailing parties" who
7 obtained the greater relief under the contracts. Furthermore, I ask the Court to enforce those
8 contracts by ordering the District to pay all of our reasonable expenses, all of our costs, and all of
9 our attorneys' fees, as the District, in 1993, agreed that it would do, under these exact
10 circumstances, in exchange for me dismissing my worthy lawsuit against the District.
11 Furthermore, I ask for any other award this Court deems appropriate.

12 I declare under penalty of perjury under the laws of the State of California that the
13 foregoing is true and correct. Executed this _____ day of January, 2007, at Aptos, California.

BARRY A. COHEN

CRAA#4158683417.3

-12-

DECL. OF BARRY COHEN IN SUPPORT OF MOTION FOR ATTORNEYS' FEES

01/22/2007 11:13 FAX 925 933 4126

MILLER STARR

026

5 24. For all the reasons previously stated, and the Court's orders and the jury's
6 findings, I ask the Court to find me and the other plaintiffs to be the "prevailing parties" who
7 obtained the greater relief under the contracts. Furthermore, I ask the Court to enforce those
8 contracts by ordering the District to pay all of our reasonable expenses, all of our costs, and all of
9 our attorneys' fees, as the District, in 1993, agreed that it would do, under these exact
10 circumstances, in exchange for me dismissing my worthy lawsuit against the District.
11 Furthermore, I ask for any other award this Court deems appropriate.

12 I declare under penalty of perjury under the laws of the State of California that the
13 foregoing is true and correct. Executed this 27 day of January, 2007, at Aptos, California.

Barry A. Cohen
BARRY A. COHEN

CBAAW413D6834173

RECEIPT OF BARRY COHEN IN SUPPORT OF MOTION FOR ATTORNEYS' FEES

01/22/2007 11:13 FAX 925 933 4126

MILLER STARR

027

1 **PROOF OF SERVICE**2 *(Barry A. Cohen, et al. v. Port San Luis Harbor District*
San Luis Obispo Superior Court, Case No. CV 040897)

3 I, Karen Irias, declare:

4 I am a resident of the State of California and over the age of eighteen years, and not
5 a party to the within action; my business address is 1331 N. California Blvd., Fifth Floor, Post
Office Box 8177, Walnut Creek, CA 94596. On January 22, 2007, I served the within
documents:6 **DECLARATION OF BARRY COHEN IN SUPPORT OF PLAINTIFFS'**
7 **MOTION FOR ATTORNEYS' FEES**

- 8 by transmitting via facsimile the document(s) listed above to the fax number(s) set
forth below on this date before 5:00 p.m.
- 9 by transmitting via electronic e-mail, to the following e-mail addresses indicated
below on this date before 5:00 p.m.
- 10 by placing the document(s) listed above in a sealed envelope with postage thereon
fully prepaid, in the United States mail at Walnut Creek, California addressed as
set forth below.
- 11 by placing the document(s) listed above in a sealed _____ envelope
and affixing a pre-paid air bill, and causing the envelope to be delivered to a
_____ agent for delivery.
- 12 by personally delivering the document(s) listed above to the person(s) at the
address(es) set forth below.

13 Martin P. Moroski
14 Adamski, Moroski, Madden & Green
15 P. O. Box 3835
16 San Luis Obispo, CA 93403-3835
17 Tel: (805) 543-0990
18 Fax: (805) 543-0980
19 e-mail:
20 moroski@adamskimoroski.com

21 *Overnight/Hand Delivery Only:*
22 6633 Bay Laurel Place
23 Avila Beach, CA 93424

24 Attorneys for Defendant and Cross-
Complainant PORT SAN LUIS
HARBOR DISTRICT

25 David M. Cumberland
26 Cumberland, Coates & Duenow, LLP
27 550 Dana Street
28 San Luis Obispo, CA 93401-3429
Tel: (805) 541-4200
Fax: (805) 541-4293
e-mail: dmcc@ccdlawfirm.com

Co-Counsel for Defendant and Cross-
Complainant PORT SAN LUIS
HARBOR DISTRICT

01/22/2007 11:13 FAX 925 933 4126

MILLER STARR

028

1

Courtesy Copy:

2

Hon. Barry T. LaBarbera
San Luis Obispo Superior Court
Department 2
1035 Palm St., 3rd Fl.
San Luis Obispo, CA 93408
e-mail:
Barry.LaBarbera@slo.courts.ca.gov

3

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

4

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

5

Executed on January 22, 2007, at Walnut Creek, California.

6

7

8

9

10

11

12

13



Karen Irias

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

CRAAA41381683417.3

-14-

DECL. OF BARRY COHEN IN SUPPORT OF MOTION FOR ATTORNEYS' FEES

01/22/2007 11:09 FAX 925 933 4126 MILLER STARR

007

1 GEORGE B. SFEIR (Bar No. 78276)
2 ARTHUR F. COON (Bar No. 124206)
3 GAVIN D. WHITIS (Bar No. 184133)
4 CAROLYN NELSON ROWAN (Bar No. 238526)
5 MILLER, STARR & REGALIA
6 A Professional Law Corporation
7 1331 N. California Blvd., Fifth Floor
8 Post Office Box 8177
9 Walnut Creek, California 94596
10 Telephone: (925) 935-9400
11 Facsimile: (925) 933-4126

7 Attorneys for Plaintiffs and Cross-Defendants
8 BARRY A. COHEN, LEONARD A. COHEN,
OLDE PORT INN, INC., and OLDE PORT
FISHERIES, INC.

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

13 BARRY A. COHEN; LEONARD A.
COHEN; OLDE PORT INN, INC.; and
14 OLDE PORT FISHERIES, INC.

15 Plaintiffs,

16 v.
17 PORT SAN LUIS HARBOR DISTRICT;
170001-50 in the

18 Defendants.

20 AND RELATED CROSS-ACTION.

FILED
JAN 22 2007
SAN JUAN IS OBISPO SUPERIOR COURT
BY Nancy G. Gudino
N. Gudino, Deputy Clerk

SAN JUAN OBISPO SUPERIOR COURT
BY Nancy G. Gudino
N. Gudino, Deputy Clerk

Case No. CV 040397

DECLARATION OF LEONARD COHEN IN
SUPPORT OF PLAINTIFFS' MOTION FOR
ATTORNEYS' FEES

Date: February 21, 2007
Time: 9:00 a.m.
Judge: Hon. Barry T. LaBarbera
Location: 801 Grand Avenue
San Luis Obispo, CA

22 I, Leonard Cohen, declare

22 I, Leonard Cohen, declare

23 1. I am the owner of the Olde Port Inn restaurant in Avila Beach, San Luis
24 Obispo County, California, and I am a plaintiff in this lawsuit. My personal residence is also in
25 Avila Beach, California. The facts stated in this declaration are true as of my own personal
26 knowledge, and if called as a witness I could and would testify competently thereto.

27 2. The law firm of Miller, Starr & Regalia ("MSR") served as counsel in a
28 preceding dispute involving my father (Barry Cohen) and Defendant Port San Luis Harbor

CRAA\4158\686347.1

• 1 •

DECLARATION OF L. COHEN IN SUPPORT OF MOTION FOR ATTORNEYS' FEES

01/22/2007 11:10 FAX 925 933 4126

MILLER STARR

008

1 District ("District"). That dispute arose due to District's illegal proposal to demolish the Harford
 2 Pier's canopy. The lawsuit was settled, and MSR participated in drafting the 1993 Settlement
 3 Agreement and the 1994 Lease, two of the agreements at issue in this case.

4 3. My father hired MSR in the prior dispute because that case involved
 5 specialized CEQA issues and a local San Luis Obispo attorney (Richard Carsel) recommended
 6 MSR. When it appeared District was breaching our settlement agreement in 2004, I participated
 7 in again retaining MSR to attempt to get District to comply. We retained MSR again because of
 8 the firm's qualifications and because the firm had handled the prior case and therefore had special
 9 knowledge of the parties and agreements at issue.

10 4. MSR, my father, and I all attempted on numerous occasions for many
 11 months prior to filing this case to persuade District to cease their breaches of contract and correct
 12 the parking, truck access and pier conditions. We offered to advance District up to \$20,000 to
 13 help undertake the changes necessary to put it in compliance. Additionally, we offered
 14 suggestions and plans regarding parking, truck unloading, and relocating the skiff racks which
 15 would not only solve the problems and cure District's breaches, but would eliminate their backlog
 16 of people waiting for skiff racks and increase their revenues from renting the suggested additional
 17 skiff racks.

18 5. District rebuffed all attempts to reasonably resolve the issues, and left us
 19 with no choice but to file a lawsuit to compel District's compliance with the settlement
 20 agreement. This suit was filed and prosecuted, and we never received any offers from the District
 21 to cease or correct its breaches at any time.

22 6. Defendant has engaged in "scorched earth" litigation tactics throughout this
 23 case. These include, but are not limited to, filing a massive but wholly meritless motion for
 24 summary adjudication, filing numerous repetitive papers at all stages of this litigation, improperly
 25 attempting to use privileged tax returns, at least doubling the length of all Plaintiffs' depositions
 26 of District personnel and other witnesses (and substantially lengthening the trial) by continuously
 27 (and, most often, meritlessly) objecting, and noticing multitudes of individual and records
 28 depositions and conducting discovery related to irrelevant issues (such as, for example, Plaintiffs'

CRAAM4158686347.1

-2-

01/22/2007 11:10 FAX 925 933 4126

MILLER STARR

009

1 personal finances). These tactics continue to the present, as evidenced by, among other things,
2 District's improper "objections" to this Court's final Statement of Decision, and by the statements
3 of Ty Green, District's counsel, to the California Coastal Commissioners, at their November 16,
4 2006 meeting in Huntington Beach (which I personally attended), including that the statements
5 that Option F was new and that the Commission should not adopt it in the LCP, and that
6 Defendant will probably appeal this Court's orders. The very fact that District filed a cost bill
7 and claims to be a prevailing party is a bad faith tactic, given the relief awarded to us in the
8 Court's Statement of Decision and Judgment, and one which has and will cause us to incur
9 substantial additional fees, costs, and expenses. As a result of District's tactics, the cost of this
10 litigation has far exceeded anything we reasonably anticipated at the outset. District never made
11 any realistically reasonable offer to settle this case taking into account those costs, the merit of
12 our claims, and District's clear breaches.

13 7. Once the monies that I had set aside for the litigation were spent, and
14 District had still not acknowledged or offered to cure its breaches of the settlement agreement and
15 to make my father, OPI, OPF, and I whole, I was forced to obtain loans against my residence in
16 the amount of \$1,000,000. These are interest only loans at a rate of 7%, which have caused me to
17 pay annual interest of \$70,000, and over \$100,000 total interest to date.

18 8. My house is up for sale, I have liquidated my retirement account, I have
19 been under tremendous financial pressure for over two years, and even if the court awards full
20 attorneys fees, it will take me years to get back on my feet and become whole, if ever.

21 9. Both my father and I have been forced to put our family houses up for sale
22 because of the debt incurred in litigating what should have been essentially a simple and
23 straightforward breach of contract claim, were it not for District's "scorched earth" tactics, bad
24 faith denial of liability, and attempts to fight a war of attrition. We have been financially
25 devastated, and will not come close to being made whole by a cost award of this Court unless all
26 recoverable expenses, costs, and attorneys' fees paid and owing are ultimately included in the
27 Court's award.

28
CRAA4158686347.1

-3-

DECLARATION OF L. COHEN IN SUPPORT OF MOTION FOR ATTORNEYS' FEES

01/22/2007 11:10 FAX 925 933 4128 MILLER STARR

0010

1 10. I walk and/or drive the Harford Pier daily in order to conduct my business
2 at Olds Port Inn. I have personally observed no completed work, or serious attempts or actions
3 by District whatsoever to comply with this Court's orders, from the time of the Court's tentative
4 ruling through the final Judgment and up until the present time.

5 I declare the foregoing to be true and correct under penalty of perjury under the
6 laws of the State of California. Executed this ____ day of January, 2007, at Avila Beach, San
7 Luis Obispo County California.

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

LEONARD COHEN

CRAAM4158686347.1

-4-

DECLARATION OF L. COHEN IN SUPPORT OF MOTION FOR ATTORNEYS' FEES

01/22/2007 11:10 FAX 925 933 4126

MILLER_STARR

011

1 10. I walk and/or drive the Harford Pier daily in order to conduct my business
2 at Olde Port Inn. I have personally observed no completed work, or serious attempts or actions
3 by District whatsoever to comply with this Court's orders, from the time of the Court's tentative
4 ruling through the final Judgment and up until the present time.

5 I declare the foregoing to be true and correct under penalty of perjury under the
6 laws of the State of California. Executed this 21 day of January, 2007, at Avila Beach, San
7 Luis Obispo County California.

LEONARD COHEN

CRAAM415F686347.1

-4-

DECLARATION OF L. COHEN IN SUPPORT OF MOTION FOR ATTORNEYS' FEES

01-22-2007 11:10 FAX 925 933 4126

MILLER STARR

012

1 **PROOF OF SERVICE**2 *(Barry A. Cohen, et al. v. Port San Luis Harbor District
San Luis Obispo Superior Court, Case No. CV 040897)*

3 I, Karen Irias, declare:

4 I am a resident of the State of California and over the age of eighteen years, and
5 not a party to the within action; my business address is 1331 N. California Blvd., Fifth Floor, Post
6 Office Box 8177, Walnut Creek, CA 94596. On January 22, 2007, I served the within
documents:7 **DECLARATION OF LEONARD COHEN IN SUPPORT OF PLAINTIFFS'
MOTION FOR ATTORNEYS' FEES**

8 by transmitting via facsimile the document(s) listed above to the fax number(s) set
9 forth below on this date before 5:00 p.m.

10 by transmitting via electronic e-mail, to the following e-mail addresses indicated
11 below on this date before 5:00 p.m.

12 by placing the document(s) listed above in a sealed envelope with postage thereon
13 fully prepaid, in the United States mail at Walnut Creek, California addressed as
14 set forth below.

15 by placing the document(s) listed above in a sealed _____ envelope
16 and affixing a pre-paid air bill, and causing the envelope to be delivered to a
17 _____ agent for delivery.

18 by personally delivering the document(s) listed above to the person(s) at the
19 address(es) set forth below.

20 Martin P. Moroski
Adamski, Moroski, Madden & Green
P. O. Box 3835
San Luis Obispo, CA 93403-3835
Tel: (805) 543-0990
Fax: (805) 543-0980
e-mail:
moroski@adamskimoroski.com

21 *Overnight/Hand Delivery Only:*
6633 Bay Laurel Place
Avila Beach, CA 93424

22 Attorneys for Defendant and Cross-
Complainant **PORT SAN LUIS
HARBOR DISTRICT**

23 David M. Cumberland
Cumberland, Coates & Duenow, LLP
550 Dana Street
San Luis Obispo, CA 93401-3429
Tel: (805) 541-4200
Fax: (805) 541-4293
e-mail: dmc@ccdlawfirm.com

24 Co-Counsel for Defendant and Cross-
Complainant **PORT SAN LUIS
HARBOR DISTRICT**

01/22/2007 11:10 FAX 925 933 4126

MILLER STARR

4013

1 Courtesy Copy

2 Hon. Barry T. LaBarbera
3 San Luis Obispo Superior Court
4 Department 2
5 1035 Palm St., 3rd Fl.
San Luis Obispo, CA 93408
e-mail:
Barry.LaBarbera@slo.courts.ca.gov

6 I am readily familiar with the firm's practice of collection and processing
7 correspondence for mailing. Under that practice it would be deposited with the U.S. Postal
8 Service on that same day with postage thereon fully prepaid in the ordinary course of business. I
am aware that on motion of the party served, service is presumed invalid if postal cancellation
date or postage meter date is more than one day after date of deposit for mailing in affidavit.

9 I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

10 Executed on January 22, 2007, at Walnut Creek, California.

Karen Innes

13 Karen Inas

CRAA441581686347.1

10

DECLARATION OF L. COHEN IN SUPPORT OF MOTION FOR ATTORNEYS' FEES